

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

BUREAU OF CONSUMER FINANCIAL
PROTECTION,

Plaintiff,

vs.

PROGREXION MARKETING, INC.; PGX
HOLDINGS, INC.; PROGREXION TELE-
SERVICES, INC.; EFOLKS, LLC; CREDIT-
REPAIR.COM, INC.; and JOHN C. HEATH,
ATTORNEY AT LAW, PC, D/B/A HEATH
P.C.,

Defendants.

Case No.
2:19-CV-298-BSJ

BEFORE THE HONORABLE BRUCE S. JENKINS

June 29, 2022

Final Pretrial Conference

Transcript of Proceedings

REPORTED BY: Patti Walker, CSR, RPR, CP 801-364-5440

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A P P E A R A N C E S

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1 SALT LAKE CITY, UTAH; WEDNESDAY, JUNE 29, 2022; 10:00 A.M.

2 PROCEEDINGS

3 THE COURT: Good morning. Welcome. Glad you're
4 here. This is in the matter of the Bureau of Consumer
5 Financial Protection vs. Progrexion and others, 19-CV-298,
6 here today for pretrial and related motions.

7 I will indicate to begin with, we'll deal with
8 motions after we've gotten an agreed pretrial order, just to
9 alert you as to process.

10 You have submitted to me a suggested form of
11 pretrial order, but before we get to that, let me have you
12 identify, for the record, those of you who are making
13 appearances, tell us who you are and whom you represent.
14 And then I'd like each side to designate the person who is
15 going to handle pretrial.

16 MS. McOWEN: Good morning, Your Honor. Maureen
17 McOwen appearing for the Bureau of Consumer Financial
18 Protection. I will be handling the pretrial order. I have
19 colleagues who also will make an appearance.

20 THE COURT: Okay.

21 MR. REISCHL: Good morning, Your Honor. Jonathan
22 Reischl on behalf of the Bureau of Consumer Financial
23 Protection.

24 MS. HILMER: Good morning, Your Honor. I'm Tracy
25 Hilmer on behalf of the Bureau.

1 MR. McCONKIE: Good morning. Taylor McConkie,
2 also on behalf of the Bureau.

3 MS. FERRARA: Good morning, Your Honor. Alicia
4 Ferrara, also on behalf of the Bureau.

5 THE COURT: Is that everybody?
6 Who is going to be the spokesman?

7 MS. McOWEN: I will, Your Honor. Thank you.

8 MR. BENNETT: Your Honor, good morning. Ted
9 Bennett, from Williams & Connolly, on behalf of the
10 defendants. With me are my colleagues, Shauna Kramer, who
11 will be handling the pretrial order. And because the
12 government has more than 700 exhibits on their list and has
13 listed nearly 50 witnesses, we divided it up, if that's okay
14 with Your Honor, to have some of our colleagues handle
15 specific parts of the government's witness list and the
16 government's exhibit list.

17 THE COURT: Well, we'll get to that eventually.

18 MR. BENNETT: I'll introduce those folks.

19 Paul Hoversten, Ed Barnidge, Loryn Helfmann,
20 Atticus DeProspero, all of Williams & Connolly. We have with
21 us a summer clerk -- she will not be appearing today --
22 Sarah Chanski, from Northwestern. And also our co-counsel,
23 Karra Porter.

24 THE COURT: Tell me your name again.

25 MR. BENNETT: Ted Bennett. It appears as Edward

1 Bennett on the docket, but only my mother calls me that.

2 THE COURT: Okay.

3 MR. BENNETT: Thank you, Your Honor.

4 THE COURT: And you're the principal spokesman?

5 MR. BENNETT: I will not be the principal
6 spokesman today, Your Honor. Ms. Kramer will be doing most
7 of the talking this morning.

8 THE COURT: Over all of it. Is that Shauna
9 Kramer?

10 MR. BENNETT: Yes, Your Honor.

11 THE COURT: Okay. Some of these are new names
12 from the prior activity that we've had in this particular
13 case. I hope you're all well acquainted with what's gone
14 before.

15 MR. BENNETT: Yes, Your Honor.

16 THE COURT: Okay.

17 I'm well acquainted of the fact that I have under
18 advisement what is essentially the argument in reference on
19 Count 1, but I'm interested in proceeding on Count 1 in
20 reference to the complaint filed by the United States.
21 Hopefully we can simplify, identify those issues that are
22 genuinely concerning parties that require decision, let's
23 put it that way. Hopefully we can take your fairly extended
24 argument that involves pretrial issues down to a more simple
25 identification of the issues actually that are involved.

1 I think it would be helpful if the United States
2 spent a few minutes this morning talking about Count 1 in
3 your complaint, which is primarily the regulation problem
4 that we've had for a time, and all the asking, on occasion,
5 factual matters. I'm interested as part of that examination
6 as to the propriety of Count 1 and the reg, that you give to
7 me the issues that you see exist in reference to that, from
8 your point of view.

9 And the impression I got from the defendants is
10 that they suggest that the regulation is simply inapplicable
11 to them. So educate me as to your view as to what these
12 folks do and why we ought to be concerned with it.

13 MS. McOWEN: Thank you, Your Honor.

14 I'm happy to start with Count 1. The Bureau's
15 view is that there is no issue to be tried on Count 1, that
16 the dispute between the parties is essentially a dispute
17 about the meaning and application of the regulation and the
18 text of the regulation. We have briefed this, and I'm happy
19 to walk through it.

20 The government's position is that 16 C.F.R.
21 Section 310.4(a)(2), we've talked about quite a lot, is a
22 billing restriction that applies to telemarketed credit
23 repair services. We believe there is no dispute of fact as
24 to whether the defendants telemarket. There is no dispute
25 of fact as to whether defendants' line of business is

1 offering credit repair services to the public.

2 THE COURT: Now you're talking here about all of
3 the defendants?

4 MS. McOWEN: That's correct, Your Honor. So there
5 are six named defendants. One is the law firm of John C.
6 Heath, attorney at law, PC, which also does business as
7 Lexington Law, which licenses the trade name Lexington Law
8 from Progrexion. And then the other five defendants are
9 Progrexion companies that are essentially within the
10 Progrexion family -- corporate family. And we have a
11 stipulation in this case that those five companies will be
12 treated essentially as one for purposes of evidence, for
13 purposes of the claims, defenses, and any judgment. They
14 operate essentially as departments of one company as opposed
15 to as fully separate entities. And that's a stipulation
16 just for purposes of this matter, Your Honor.

17 So our position is that both the law firm and
18 Progrexion are in the business of offering telemarketed
19 credit repair services. The credit repair is offered under
20 two brand names, CreditRepair.com and Lexington Law. They
21 are often marketed as competitors in the credit repair
22 market, but they are essentially sister companies. They are
23 brands owned by the same company.

24 And the telemarketing is done by one of the
25 Progrexion defendants named Progrexion Teleservices, which

1 is primarily involved in making and receiving telemarketing
2 and telesales calls, and that is an agent of the law firm,
3 Heath PC. And there's no dispute about that, Your Honor,
4 that the law firm, Lexington Law, has represented to this
5 Court that when Progrexion Teleservices is making phone
6 calls to either potential or actual Lexington Law clients or
7 receiving phone calls from potential or actual Lexington Law
8 customers, that Progrexion Teleservices is acting as Heath's
9 agent.

10 The other entity that is primarily involved in the
11 telemarketing aspect is CreditRepair.com, which has, again,
12 call centers with sales staff staffing the phones, making
13 both outbound and inbound calls to market and sell
14 CreditRepair.com services.

15 There is another entity within the five Progrexion
16 defendants called eFolks, which is another sort of marketing
17 department, if you will, that did something a little
18 different, which is that they would take leads, which is
19 lists of consumer names and telephone numbers, contact
20 information, and eFolks, as we understand it, would make
21 outbound calls to those people to advertise primarily the
22 credit repair services of Lexington Law and
23 CreditRepair.com. So they play a role in that telemarketing
24 as well.

25 In terms of the overarching structure, the

1 services are primarily performed, if you will, by
2 Progrexion. Progrexion owns and operates the software
3 systems that are these sort of automated core of the credit
4 repair service that they are offering. Progrexion also
5 handles all of the marketing for both CreditRepair.com and
6 Lexington Law. Progrexion also handles the payment
7 processing, for example, for both CreditRepair.com and
8 Lexington Law.

9 But we do assert that both Progrexion and Heath PC
10 are in violation of the telemarketing sales rule, billing
11 provision, the provision I mentioned earlier,
12 Section 310.4(a)(2). Both companies are, as I said,
13 indisputably involved in offering telemarketing credit
14 repair services as to both companies and both brands.
15 There's no dispute as to how they bill their customers.
16 They do not wait the prescribed period under the rule. And
17 that is the crux of the government's argument.

18 The defendants, as you said in your introduction,
19 Your Honor, the defendants take the view that this rule does
20 not apply to them. But it really is not based on a question
21 of fact that would be appropriate to send to a jury to
22 decide that. Their defenses are legal in nature. We
23 dispute them strongly. We see no exceptions in the
24 regulation where the defendants have read them in. And as I
25 said, I think we have thoroughly briefed this sort of legal

1 issue that is at the crux of the parties' dispute as to
2 Count 1, and we genuinely believe that there is no material
3 dispute of fact as to Count 1.

4 I will say with one caveat, and that is if the
5 Court rejects the government's interpretation of the
6 regulation, which, as I said, from our perspective, it's
7 very straightforward. It is a billing restriction that is
8 applicable to telemarketed credit repair services that
9 requires that the company comply with the two subparts of
10 the regulation before receiving payment from their
11 customers.

12 If that's the interpretation, if the Court adopts
13 the government's interpretation of the regulation, then
14 there really is -- there's nothing to be tried.

15 If the Court -- so defendants press a different
16 reading of the regulation to be generous. The defendants'
17 position, as I understand it, is that the part of the
18 payment, the restriction on when payments can be requested
19 or received, which is found in both Romanettes (i) and (ii)
20 to the regulation, their position is that if the defendants
21 were not guaranteeing specific credit repair results, then
22 they are not covered by the regulation.

23 We strenuously disagree with that view. But we
24 concede that if the Court were to read that rule that way,
25 and we think it would require a departure from the plain

1 text of the regulation and the entire regulatory history and
2 enforcement history of the regulation, but were the Court to
3 adopt defendants' view, then there would be a dispute as to
4 what credit repair results were promised to consumers by
5 these defendants.

6 Now as I said, we don't believe you need to reach
7 that issue, we don't believe it's presented, and we don't
8 believe it would be properly presented to a jury. But if it
9 is deemed to be an element that the government must prove in
10 order to bring this claim, Count 1, then we will need to put
11 forward evidence as to the credit repair promises that were
12 being made by the defendants. And of course the defendants
13 will need, in that situation, to put forward their own
14 evidence, they say, establishing that they made no such
15 guarantees.

16 THE COURT: Why don't you give me a brief
17 exposition of how you understand the whole process works and
18 who the players are at each intermediate step.

19 MS. McOWEN: Are you interested, Your Honor, in
20 the Hotswap facts or in the more generic credit repair facts
21 applicable to Count 1?

22 THE COURT: I understand the affiliate argument,
23 but I'm interested in the specifics, who gets on the
24 telephone, who are we talking to? When we purportedly talk
25 to the lawyer office, what person are we talking to? What

1 category of person are we talking to?

2 MS. McOWEN: I'm happy to walk through that.

3 So I will take, for example, to walk through the
4 customer experience of someone who is coming through one of
5 the relevant Hotswap partners.

6 So this person might see an advertisement online
7 for an apartment or a house for that's being offered as a
8 rent-to-own house. It might have a specific price, number
9 of bedrooms, other features advertised.

10 THE COURT: Are we only talking about the Hotswap
11 people?

12 MS. McOWEN: Well, this would just be -- I will
13 explain sort of how the consumer comes in through that
14 channel since it is relevant --

15 THE COURT: That particular methodology, okay.

16 MS. McOWEN: I'm happy to talk about a different
17 scenario as well. But for this person, they pick up the
18 phone. They make a call to the phone number advertised in
19 the post. They then reach someone employed by the Hotswap
20 partner, which is a separate company. Let's take, for
21 example, Easy Home Ownership.

22 They're on the phone with a telemarketing agent of
23 Easy Home Ownership, who proceeds to -- the way they
24 describe it is warms them up, warm up the consumer by
25 talking to them about a rent-to-own house, a rent-to-own

1 program, about a program for becoming a home owner, getting
2 mortgage credit, et cetera. And they tell the consumer, in
3 the typical case, that the only thing holding them back from
4 obtaining that desired credit product or home is that their
5 credit score is too low.

6 And so as a first step and as a necessary step,
7 they had to be transferred, on the telephone, to another
8 agent. At that moment -- and I would be happy to play a
9 call recording for Your Honor to show this -- at that
10 moment, the consumer, who is still on the phone, is live
11 transferred to a telemarketer, who is typically employed by
12 either CreditRepair.com or Progrexion Teleservices.

13 So if it's a Lexington Law Hotswap, then the phone
14 will be transferred to a Progrexion Teleservices agent who
15 will introduce themselves as an agent of Lexington Law.

16 THE COURT: Now who's talking here? Progrexion?

17 MS. McOWEN: This is a person employed by
18 Progrexion Teleservices, yes. And the person's title, at
19 least as of the last several years, that person's title
20 would typically be the credit consultant, or that's how they
21 would represent themselves to the consumer. They would not
22 say paralegal. At a certain point that was phased out.

23 THE COURT: Now you suggest they are employees of
24 Progrexion?

25 MS. McOWEN: Yes, Your Honor.

1 THE COURT: And are paid by Progrexion?

2 MS. McOWEN: That's correct.

3 THE COURT: And are not employees of the law firm?

4 MS. McOWEN: That is correct, Your Honor. But
5 they are agents of the law firm because they are --

6 THE COURT: That's a different question. But
7 they're hired by Progrexion?

8 MS. McOWEN: That is our understanding, yes,
9 Your Honor. That individual would be getting a paycheck
10 from Progrexion Teleservices. Their boss will be someone
11 from Progrexion Teleservices. They will introduce
12 themselves on the telephone to the consumer as this is
13 Maureen from Lexington Law or, you know, whatever their name
14 is.

15 THE COURT: They have a conversation with the
16 prospective client?

17 MS. McOWEN: Correct. And the goal of that
18 conversation is to enroll the prospective customer into the
19 subscription credit repair services that are offered by
20 Lexington Law.

21 THE COURT: Okay. Now the nature of that
22 conversation as such, does it result in a written document,
23 a contract with that person?

24 MS. McOWEN: Yes. In the typical case that we've
25 heard on -- it's both scripted, Your Honor, and so it's

1 visible in the scripts that we have reviewed and presented,
2 and it's also audible in the call recordings that we have.

3 What will happen is that once the consumer -- if
4 the consumer agrees to sign up for credit repair services
5 with Lexington Law, then the agent on the telephone will
6 send the consumer a text message, typically. The agent on
7 the telephone will read through a certain -- I guess the
8 primary points of the engagement agreement, certain
9 disclaimers. There's text that they will read through in
10 the script, and then ask the consumer to text the word agree
11 in response to the text message they have received. That
12 seems to be the most common way that this is done.

13 It can also be done verbally where the
14 teleservices agent will read a more extensive portion of the
15 agreement and get verbal agreement rather than text message
16 agreement from the consumer.

17 THE COURT: Is there a conversation about payment?

18 MS. McOWEN: There's a conversation about payment
19 at that time, Your Honor. The payment that is requested
20 immediately is ostensibly a payment for obtaining the
21 consumer's TransUnion credit report. And there's a very
22 substantial markup on that credit report, but typically the
23 consumer is charged either 12.99 or 14.99 at that time.

24 THE COURT: At that time, and they get a credit
25 report at that time?

1 MS. McOWEN: They do not, Your Honor. The credit
2 report gets received into the Lexington Law or
3 CreditRepair.com system and the consumer does not get a copy
4 of it. They get access because they're signing up. This is
5 inextricably linked to the sign-up for credit repair
6 services. So that credit report becomes part of their
7 credit repair file, if you will.

8 THE COURT: Is that done during that conversation?

9 MS. McOWEN: Yes, Your Honor. That is done during
10 that conversation. And then the Progrexion teleservices
11 agent will typically then walk through the consumer's credit
12 report focusing on what we would call negative trade lines
13 or derogatory marks on the consumer's credit report.

14 THE COURT: How is that paid for?

15 MS. McOWEN: I'm sorry, Your Honor?

16 THE COURT: There's a charge for the credit
17 report. Is that a charge of Progrexion or is that a charge
18 of the one of the three credit reporting agencies?

19 MS. McOWEN: That is a charge that Progrexion
20 charges. They charge that -- they charge that charge
21 separately. It is not billed through the law firm. It is
22 billed directly through one of the Progrexion entities -- a
23 Progrexion subsidiary. The exact subsidiary I think has
24 changed over time, but I don't believe it's material.

25 THE COURT: Do they acquire the report?

1 MS. McOWEN: That's correct.

2 THE COURT: Is there a markup on the report?

3 MS. McOWEN: There is a price markup, yes.

4 THE COURT: About how much is that?

5 MS. McOWEN: We've calculated it to be, I think,
6 over five times, and I can get you the --

7 THE COURT: I don't understand that.

8 MS. McOWEN: Sure.

9 THE COURT: You charge the client?

10 MS. McOWEN: Well, from the information we have,
11 which is to say the contracts between the defendants and
12 TransUnion, which is providing the credit report, it depends
13 on the volume. And there are some other sort of small
14 add-ons, but essentially the credit report costs a couple of
15 dollars.

16 THE COURT: To Progrexion?

17 MS. McOWEN: Correct.

18 THE COURT: Now is it paid for by a credit card?

19 MS. McOWEN: Usually -- in the vast majority of
20 cases it is made by either a credit card or a debit card.
21 Then it can sometimes be paid by what's called an ACH
22 transfer directly from someone's bank account. So the
23 consumer could provide their bank account number and routing
24 number and have it charged without going through a card, but
25 it is an electronic transaction. And Progrexion --

1 THE COURT: Ordinarily it's a card?

2 MS. McOWEN: I would say ordinarily -- more often
3 than not it is a card.

4 THE COURT: Okay. And then there's a conversation
5 about the credit report and people go through the credit
6 report?

7 MS. McOWEN: That's correct. Again, we're talking
8 about the typical call. Once the consumer has signed up,
9 agreed, paid for the TransUnion report, then the Progrexion
10 Teleservices agent would walk through the negative items on
11 that person's credit report. And the Progrexion
12 Teleservices agent is expressly not allowed to provide
13 advice, including they are expressly not allowed to provide
14 legal advice to the consumer. They merely set out the
15 options for how to challenge the items on the consumer's
16 credit report.

17 THE COURT: But you have items that are
18 identified --

19 MS. McOWEN: That's correct.

20 THE COURT: -- in that conversation?

21 MS. McOWEN: Correct.

22 THE COURT: Okay. And then what is suggested, if
23 anything?

24 MS. McOWEN: Well, our understanding is that the
25 Progrexion Teleservices agent is not supposed to suggest

1 anything to the consumer. They merely --

2 THE COURT: Well, they are helping identify
3 something that people contest.

4 MS. McOWEN: They are marking down the reasons the
5 consumer gives them to contest or sometimes suggesting
6 reasons or ways the consumer should contest.

7 THE COURT: Then what happens?

8 MS. McOWEN: Our understanding is then that gets
9 marked in the consumer's electronic record. And the
10 consumer -- essentially that is the end of the call. So
11 once all the negative items have been talked through, which
12 usually takes a couple of minutes, then --

13 THE COURT: Who does what?

14 MS. McOWEN: You mean what happens next with the
15 service?

16 Well, I will say the actual nuts and bolts of the
17 service are somewhat beyond the scope of this case. And so
18 I can tell you generally what we understand to happen, which
19 is that there is a computer run algorithm that will, based
20 on the coding that's been done during that initial call --
21 so, for example, if I have a derogatory item on my credit
22 report saying that I had a late payment on a credit card a
23 couple of years ago, then I might be given the option to
24 challenge that saying it was not mine, as in it was not my
25 card, it should not be on my credit report, that it was

1 never late, that I never paid that late, that's a mistake.

2 The vast majority of these challenges that
3 Lexington Law and CreditRepair.com do are what they call
4 item verify, which is a much more general request that the
5 credit reporting company or the furnisher verify the item.

6 So let's say I choose item verify for my credit
7 card late payment. Then that goes into the system. It's
8 checked, as you know, item verify on that item.

9 What we understand, to the best of our
10 understanding, the algorithm then would determine whether
11 and when -- if so when, to send a challenge to either the
12 credit reporting agency or the credit card company that has
13 reported that trade line, or to both, and that that would
14 then be electronically sent out. It's automated.

15 So what's been described to us is that once it is
16 tagged or coded by that telemarketer, that the system sort
17 of runs itself.

18 THE COURT: Okay. After identifying the disputed
19 items, and we've agreed that I'm going to pay something in
20 the future, does my contract require my payment of a
21 particular level of service?

22 MS. McOWEN: Your contract will set out the
23 various levels of service. I don't believe the contract
24 specifies which one the customer has. The contract will
25 have their name affixed to it as a sort of an electronic

1 signature based on them having texted back or verbally
2 agreed. It's not countersigned by anyone from the law firm.
3 And I don't believe it specifies the service level, as they
4 say.

5 But what will happen in terms of the billing,
6 which is highly relevant to Count 1, is what they call the
7 first work fee, which is typically about \$100, is charged
8 five to 15 days after that initial call, that sign-up call,
9 and then the monthly charge will be withdrawn from the
10 consumer's account on a monthly basis thereafter until the
11 consumer --

12 THE COURT: Are these physically billed or are
13 they in some fashion determined by the contract?

14 MS. McOWEN: They are determined by the contract
15 and they are automatically withdrawn from the consumer's
16 account or card.

17 THE COURT: In the contract do they state what
18 they're going to do?

19 MS. McOWEN: In vague terms the contract explains
20 that it is a credit repair service, the purpose of which is
21 to seek the removal of negative items from the consumer's
22 credit report and to improve the consumer's credit history.

23 It states what they will not do, which is that
24 they will not represent the consumer in any sort of legal
25 action. It's very clear about what legal services are not

1 provided.

2 I will say the Lexington Law contract and the
3 CreditRepair.com consumer contract are, in terms of their
4 description of the services, substantively the same despite
5 the fact that the Lexington Law services are advertised as
6 legal services.

7 THE COURT: Tell me who signs the letter that goes
8 to the agency.

9 MS. McOWEN: I believe the best answer is that the
10 computer will put a typed signature onto the letter. And
11 then that is printed, stuffed into an envelope somewhere,
12 and sent off. I will clarify that with respect to Equifax,
13 TransUnion, and Experian, the three national credit
14 reporting companies.

15 The defendants have stopped sending actual
16 letters. What they send instead is an electronic
17 transmission through a sort of designated electronic system.
18 They pay the credit reporting companies for use of that
19 system, and there is no actual paper letter anymore.

20 THE COURT: Okay. To whom is the -- if there's a
21 reply, to whom is the reply sent?

22 MS. McOWEN: With respect to the credit furnishers
23 where a letter is actually posted, the response, if there is
24 one, would go directly to the consumer and not to any of the
25 defendants.

1 With respect to the electronic transmission, our
2 understanding is that there really -- our understanding is
3 that there isn't really a response from the system to any
4 individual query.

5 THE COURT: Okay. Now if I have identified my
6 contested items in the credit report, who creates the
7 letter?

8 MS. McOWEN: Our understanding, Your Honor, is
9 that Progrexion has a computer system that contains a
10 database of form letters, blank letters, and that when the
11 Progrexion Teleservices agent on the telephone with the
12 consumer marks down that the consumer wants to challenge
13 this delinquent -- this derogatory item, the credit card
14 payment we talked about, and they want to challenge this
15 item verify, then that goes into the computer system. The
16 computer algorithm selects a form letter, puts the address
17 of the credit card company on the form letter, puts the name
18 and address of the consumer on the form letter, puts, you
19 know, a kind of italicized signature, typed signature
20 usually onto the form letter, and then that gets generated
21 out. So there isn't a human being in the company that is
22 involved in that process with respect to the consumer's
23 challenge of that trade line.

24 Now the defendants want to point out that someone
25 wrote the letters, and I guess that's true. At some point

1 there may be some human involvement in producing the normal
2 letters that go into this computer system.

3 THE COURT: Is there an extended -- I recognize
4 that there are termination powers on the part of parties
5 that exist. Is there something said about what else would
6 be done other than generating the letters?

7 MS. McOWEN: Well, Your Honor, the generation of
8 the letters is spaced out over time. So when the consumer
9 signs up, it's not the case that all of their challenges or
10 intervention letters are generated right away.

11 The way the defendants have structured their
12 services is that depending on your service level, you're
13 entitled to a certain number of challenges per month. And
14 so also depending on the number of negative marks on your
15 credit report, that's going to affect that as well.

16 Those letters will, they say, continue to be
17 generated, whether it's, you know, three per month or five
18 per month, while the consumer is an enrolled customer. That
19 really is the primary service being offered as a credit
20 repair service.

21 THE COURT: When do I get to talk to a lawyer?

22 MS. McOWEN: Typically you will get to talk to a
23 lawyer if you have a complaint about the services that have
24 been provided to you and you escalate that complaint to the
25 point where you have requested to speak to the lawyer, or

1 the lower level staff deems it something that needs to be
2 escalated to an attorney. So it is the rare case where a
3 customer of Lexington Law actually speaks to a lawyer
4 substantively about their cases is our understanding.

5 We have not -- again, I think that's somewhat --
6 it's really not material to our case. It came up in the
7 context of our request for call recordings.

8 You might recall that the Court's resolution of
9 that was to say that the call recordings involving a
10 Progrexion Teleservices agent and a consumer were not
11 privileged attorney-client communications. And the Court
12 said that if there were any call recordings involving an
13 attorney, or even involving a paralegal, conveying a
14 response to a question put to an attorney, that those
15 recordings could be withheld on grounds of privilege.

16 No call recordings were withheld from the samples
17 we requested. So our only conclusion is that that is a very
18 rare instance indeed. And in interviewing consumers and
19 speaking to consumers who have used these services, that's
20 confirmed as well. Very few of them have ever spoken to an
21 attorney.

22 The system is set up -- and this is something that
23 the defendants tout, is the system is set up to run on a
24 computer algorithm without the need for or participation of
25 attorneys in the provision of the service in the ordinary

1 course. It is, they say, set up to run on this
2 superefficient algorithm rather than involving any attorneys
3 or even, you know, paralegals working with attorneys to sort
4 of review and provide legal advice on the consumer's credit
5 situation.

6 THE COURT: Well, the issue that you suggest
7 exists is whether or not the reg applies to what they're
8 doing, and you have briefly described, at least in part,
9 what they're doing. And do you see any other issues at all
10 in Count 1?

11 The reason I ask is that Count 1 took up the major
12 portion of the suggested form of pretrial order. And while
13 it is argued a lot, I'm really interested in nailing down
14 the issue for decision.

15 MS. McOWEN: Your Honor, the only issue we see for
16 decision is whether this regulation applies to the
17 defendants. And I would say beyond that, if it does, then
18 we would seek an opportunity to brief the question of
19 relief. The Bureau would be seeking injunctive relief for
20 the defendants to actually comply with the regulation as
21 well as monetary relief. And that's been discussed in some
22 of the papers that you've seen, but it hasn't been --
23 obviously we haven't gotten to that stage.

24 THE COURT: Why don't you tell me why you think it
25 applies?

1 MS. McOWEN: We believe the regulation applies
2 because the FTC set out to put guardrails on an extremely
3 high risk industry. This is a doubly high risk industry
4 because it is in the telemarketing industry, which Congress
5 has found to be, unfortunately, more affected by issues of
6 deception and abusive conduct than many other ways of
7 selling products and services. And credit repair, which the
8 Federal Trade Commission, through extensive study,
9 determined was rife with consumer abuse. Misrepresentations
10 about what can be accomplished for a consumer who has a bad
11 credit score and derogatory marks on their credit report the
12 FTC has studied quite extensively.

13 In one study, for example, they found that one in
14 250 people could see a credit score increase of 100 points
15 if they got an error removed from their credit report. So
16 that person stands to benefit quite a lot from correcting
17 that error.

18 But, unfortunately, the majority of defendants'
19 customers, and the majority of people, period, consumers
20 generally, cannot, in a short period of time, materially
21 improve their credit standing. And what credit repair
22 companies do, and particularly telemarketed credit repair
23 services that are operating on a very, very, very large
24 commercial scale, is that they are representing that anyone
25 can benefit from these services, and that your average

1 person who has derogatory marks on their credit report could
2 see a material and significant improvement in their credit
3 standing by hiring this company to, quote, unquote, clean up
4 their report.

5 Now we are not here to argue about the efficacy of
6 defendants' services. We actually think that issue is
7 wholly irrelevant and shouldn't come into the trial. We
8 aren't conceding that the defendants' services are
9 effective, but really this case is not about whether they
10 are or they aren't, because what the FTC did when it enacted
11 this regulation is it set up guardrails to protect consumers
12 from these kinds of sales representations, this hope -- this
13 often false hope that is being sold to consumers with poor
14 credit, that those consumers don't need to pay for the
15 service unless it actually improves their credit record.

16 The genius of this rule is that it enters a risk
17 laden industry where consumers are really being taken
18 advantage of and harmed, and it sets these guardrails that
19 allow the consumer essentially the protections of almost
20 like a contingency fee agreement where they only have to pay
21 if it works.

22 Now there's no guarantee that it will work, and
23 for many people it will not, but the rule says that the
24 company cannot charge unless it does.

25 Now the defendants here say that they're different

1 from most credit repair services because they say they
2 actually, unlike some, provide services. They actually send
3 the letter. They say it's not illusory, and they say it
4 works.

5 Now, again, we don't concede their general
6 efficacy claims, but if it does work as well as they say,
7 then this regulation -- they should be able to operate in
8 full compliance with this regulation by simply charging
9 their consumers after they have demonstrated that their
10 highly effective service has accomplished those results.

11 Now the regulation uses the phrase promised
12 results, and that is what has become sort of a hang-up in
13 this case and it's the hook that the defendants grab onto to
14 try to make their argument about this regulation not
15 applying unless there is an express guarantee. We read it
16 very differently, Your Honor.

17 The reference in Romanette (ii) to promised
18 results, again, we need to think of it more like a
19 contingency fee agreement where there's an understanding
20 between the company providing the service and the consumer,
21 or there should be, about what result is being sought and
22 what payment will be made for that if that's accomplished.

23 So, for example, there could be an arrangement
24 where the consumer has an understanding that if a derogatory
25 item is removed from their credit report, and if, in

1 compliance with the regulation, it can be shown that that
2 item was removed and stayed off the credit report and didn't
3 come right back on within six months, then the company can
4 charge for that removal. The company can charge the
5 consumer -- there's no restriction on how much the company
6 can charge for these services, these results.

7 The restriction in the regulation is that they
8 cannot charge until they've demonstrated that it happened
9 and that it has been -- is that it's durable, that the
10 removal didn't just get reinserted right away, which is a
11 function of the credit reporting system, and something that
12 the FTC took into consideration when they drafted the
13 regulation. They said you have to demonstrate that this has
14 been accomplished and that it has stayed that way for six
15 months.

16 It's an incredibly practical regulation. It does
17 not say that you can't telemarket credit repair services.
18 It simply says if you do, then you must comply with this
19 billing restriction.

20 And that's why we're here, Your Honor, because
21 these are credit repair companies. There's no question
22 about that. They are engaged in a large scale telemarketing
23 operation. There's no question about that. And they charge
24 consumers on a monthly basis without waiting, as prescribed
25 by the regulation, without waiting until the full time

1 period for all services has expired and the promised results
2 have been achieved, demonstrated in the form of a consumer
3 report that was issued more than six months after the
4 result. In that situation, then, they are free to go forth
5 and charge their customer, and they would be in compliance
6 with the regulation.

7 So that's why we believe this regulation applies.
8 We believe it's very important as a consumer protection. It
9 is not a technical matter. It's actually incredibly
10 thoughtful and a well supported regulation that the FTC
11 promulgated after doing extensive research, notice and
12 comment processes, which they then repeated. This rule
13 actually went through, I believe, three separate rounds of
14 notice and comment rule making. It's been very thoroughly
15 looked at and analyzed under the FTC's unfairness authority
16 as well. And the FTC has found that this regulation --
17 compliance with this regulation is necessary to protect
18 consumers in this marketplace from unfair and abusive
19 conduct.

20 And we believe that, again, there's no question of
21 fact. We read the regulation as it's written. We've never
22 read it any other way. We point to the enforcement history
23 of this regulation. We point to statements by the Federal
24 Trade Commission in prior enforcement actions in amicus
25 briefs and intervenor briefs. We point to the regulatory

1 history. But really it's a plain language reading of the
2 rule. That is why it applies and why we think there's
3 really just no dispute of fact that should weary a jury on
4 this.

5 We do believe that if we can resolve this issue
6 and this question of law, that it would very much narrow the
7 matters for trial. It would reduce the Bureau's witness
8 list quite a bit. It would reduce the Bureau's's exhibit
9 list quite a bit. We believe it would render several of the
10 defendants' experts superfluous, irrelevant. So sort of as
11 a threshold question, we're happy to spend time trying to
12 resolve this.

13 THE COURT: Thank you.

14 MS. McOWEN: Thank you, Your Honor.

15 THE COURT: Let's take a ten-minute break, give
16 the court reporter a break. We'll resume in ten minutes and
17 we'll hear from counsel.

18 MS. McOWEN: Thank you, Your Honor.

19 MS. KRAMER: Thank you, Your Honor.

20 (Recess)

21 THE COURT: Counselor, why shouldn't the reg
22 apply?

23 MS. KRAMER: Good morning, Your Honor. I'm happy
24 to discuss the application of the regulation.

25 Our position is that this particular regulation,

1 and specifically Romanette (ii) of section (a)(2), does not
2 apply to the defendants in this case, because the defendants
3 do not promise results to their clients or to consumers.

4 THE COURT: What good are they?

5 MS. KRAMER: The defendants do promise a number of
6 things to consumers, Your Honor, that are laid out very
7 clearly --

8 THE COURT: What do they promise?

9 MS. KRAMER: We, in our contract -- which I'm
10 happy to bring up, Your Honor, and show you directly in
11 black and white what we do promise our consumers.

12 If you don't mind, Mr. Schliesske, please bring up
13 JX-13.

14 This, Your Honor, is a set of documents that
15 contain the disclaimers and contract for consumers who sign
16 up with Lexington Law. If we go to page ten of this
17 particular document, you'll see there's an engagement
18 agreement and limited designation of agency between the
19 client and John Heath, attorney at law, doing business as
20 the Lexington Law firm.

21 Now if we go down through this document, you'll
22 see initially in the definitions, there's information about
23 the service interval, for example, section (E), which is the
24 time frames in which we do offer services, the services of
25 which are laid out below.

1 If we scroll down in this document, you'll see a
2 section titled Services and Representations that begins at
3 the bottom of this page. This lays out very clearly the
4 promises, which are services and efforts that Lexington Law
5 is going to give to the client, or to the consumer who signs
6 up. Both on this page and the services and representations
7 section and laid out on the next several pages in detail for
8 the client is exactly what Lexington Law is promising to do.

9 For example, Lexington Law is promising to provide
10 services in the form of sending out letters or challenges to
11 creditors and credit bureaus.

12 THE COURT: Their suggestion was that nobody talks
13 to a lawyer before the letters go out.

14 MS. KRAMER: That was suggested. That is not
15 always the case, Your Honor.

16 THE COURT: Well, let's talk about what is the
17 case. You tell me what's done.

18 MS. KRAMER: Yes, Your Honor.

19 Your Honor asked when does the client get to speak
20 with the lawyer. The client gets to speak with a lawyer at
21 their request whenever they request it. There may be
22 clients who say before signing up for a contract even, I
23 would like to speak with a lawyer. They may say before
24 sending out a letter --

25 THE COURT: At what point in time does the letter

1 go out?

2 MS. KRAMER: Letters will only go out after a
3 consumer or a client has signed the contract, after they
4 have completed their initial intake interview in
5 conversation with, nowadays, a Progrexion employee. And
6 then that client's entire file and profile is set up and put
7 into the system.

8 In terms of when that client can speak with a
9 lawyer --

10 THE COURT: No. I asked when does the letter go
11 out.

12 MS. KRAMER: The letters go out during our first
13 service interval after a client has signed up on the
14 contract.

15 THE COURT: Before he talks with a lawyer?

16 MS. KRAMER: Potentially, Your Honor.

17 THE COURT: Before he ever talks to a lawyer the
18 letters go out?

19 MS. KRAMER: Potentially, Your Honor, but that's
20 not always the case necessarily.

21 THE COURT: Well, you tell me what's always the
22 case.

23 MS. KRAMER: What's always the case, Your Honor,
24 is that a client has an opportunity to request to speak to a
25 lawyer at any time during their engagement with Lexington

1 Law.

2 THE COURT: Prior to such a request, do the
3 letters go out?

4 MS. KRAMER: For some clients, yes, but some
5 clients may request to speak with a lawyer either before
6 they sign the contract or shortly after signing the contract
7 before any action is taken.

8 THE COURT: Are there percentages?

9 MS. KRAMER: I don't have those available right
10 now, Your Honor, but I can look into that information and
11 get back to you.

12 THE COURT: You go ahead.

13 MS. KRAMER: So I'm happy to elaborate more on the
14 services that are offered, Your Honor, and the time lines,
15 but specific to Count 1 -- I know Your Honor is asking what
16 is the issue for Count 1.

17 THE COURT: That's it.

18 MS. KRAMER: The issue that's squarely on the
19 table is whether Count 1, in particular, as I mentioned,
20 Romanette (ii), in this particular statutory provision, is
21 whether that applies to defendants. Defendants' position is
22 based on the plain text of the statute and the unambiguous
23 factual record --

24 THE COURT: Are we talking the reg or are we
25 talking the statute?

1 MS. KRAMER: The statute. My apologies,
2 Your Honor.

3 THE COURT: Read me the section that you're
4 talking about.

5 MS. KRAMER: We're talking about 16 C.F.R. Section
6 310 -- sorry, the regulation -- 4(a)(2).

7 THE COURT: We're talking the reg?

8 MS. KRAMER: That is correct, Your Honor. My
9 apologies for my misstatement.

10 And in Romanette (ii) under (a)(2) we find the
11 requirement about providing the person with documentation in
12 the form of a consumer report from a consumer reporting
13 agency demonstrating that the promised results have been
14 achieved.

15 Defendants' position, and I know we've briefed
16 this and argued this before, is that this particular
17 provision does not apply to defendants because the
18 unambiguous factual record shows that we do not promise
19 results, looking just at that document alone that we brought
20 up a moment ago.

21 THE COURT: How do you define results? How do you
22 define results?

23 MS. KRAMER: In terms of results, Your Honor, it
24 can be, for example, in other cases where this regulation
25 has been applied promising that a particular consumer will

1 get 90 points increased on their credit score, or promising
2 that certain derogatory information will definitely be
3 removed within 30 days. Those are the types of results that
4 other defendants in other cases have promised and that are
5 subject to this regulation.

6 But in terms of what results mean for defendants
7 in respect to our services, we state in our contracts very
8 clearly that we are not promising a particular result. We
9 use the exact same word that's in the statute, and that's
10 not unintentional. We lay out in black and white -- and I'm
11 happy to bring it up and show Your Honor.

12 JX-13, please, Mr. Schliesske.

13 If we go to page 11 of this document, please,
14 there's a paragraph that starts -- the third full paragraph
15 down, Lexington cannot guarantee and you are not paying for
16 a particular credit report outcome or result. The exact
17 language.

18 So when we're talking about what's the issue for
19 Count 1 --

20 THE COURT: Well, what do I pay you for?

21 MS. KRAMER: You pay -- and the sentence
22 continues, you can see on this document, you are paying only
23 for Lexington's efforts on your behalf.

24 THE COURT: Well, tell me what the efforts are.

25 MS. KRAMER: Yes, Your Honor.

1 THE COURT: Lexington's efforts are.

2 MS. KRAMER: Yes. There are a couple of different
3 efforts, Your Honor. And, again, this contract that we're
4 looking at is with Lexington Law.

5 Lexington Law's efforts include sending out the
6 challenges and sending out letters to --

7 THE COURT: No, no. No one has talked to them.
8 The letters go out automatically, purportedly.

9 MS. KRAMER: They do go out according to an
10 automated system, but that system, all of the inputs and the
11 letters themselves have been either written or reviewed and
12 approved by attorneys at Lexington Law.

13 THE COURT: Well, now in the suggested form of
14 pretrial order, they talk about -- on page 13, subsection
15 (b), it says Progrexion markets Lexington Law and
16 CreditRepair.com as services that will assist consumers in
17 removing derogatory information from, or improving, the
18 consumer's credit history, credit record, or credit rating.
19 That's a stipulated, uncontested fact, as I understand it.

20 MS. KRAMER: It is, Your Honor, and that's drawn
21 directly from the complaint and the answer filed in this
22 case.

23 THE COURT: That's what it says.

24 MS. KRAMER: It does, Your Honor, and --

25 THE COURT: And do you indeed market Lexington Law

1 and CreditRepair as services that will assist consumers in
2 removing derogatory information from or improving the
3 consumer's credit history, credit record, or credit rating?
4 Is that what you're marketing?

5 MS. KRAMER: I'm sorry, Your Honor?

6 THE COURT: Do you, in fact, market according to
7 your stipulation?

8 MS. KRAMER: Yes, Your Honor. That is a portion
9 of the marketing that's done by Progrexion for Lexington Law
10 and CreditRepair.com. But what Progrexion does not say in
11 that marketing and advertising and what's very clear in all
12 of the company's policies with respect to marketing and
13 advertising is that we cannot guarantee or promise that
14 particular derogatory information will be removed from a
15 credit report or that a consumer will see a particular
16 improvement in their credit score.

17 THE COURT: Tell me what your services are.

18 MS. KRAMER: We assist consumers --

19 THE COURT: Now who's to assist them? Who's to
20 assist them?

21 MS. KRAMER: Yes. In the case of a consumer who
22 signs up with Lexington Law, it's Lexington Law.

23 THE COURT: Okay. Now how does Lexington Law
24 assist them if the conversation stops with the so-called
25 representative of Progrexion?

1 MS. KRAMER: Yes, Your Honor. Although there may
2 only be a conversation with a representative from
3 Progrexion, the services that are provided in terms of the
4 software and the algorithms that run, generate and send out
5 letters are all services that were either generated or
6 approved by and are overseen by Lexington Law.

7 THE COURT: Who are they owned by?

8 MS. KRAMER: So the systems, in terms of the
9 patents, in terms of the software itself, is owned by
10 Progrexion. But the --

11 THE COURT: Do they have pattern letters? Does
12 Progrexion own the pattern letters?

13 MS. KRAMER: There's a particular individual,
14 Randy Padawer, who's on defendants' witness list, who does
15 own three patents related to the credit repair services that
16 are offered.

17 THE COURT: No, no. The letters, who owns the
18 letters?

19 MS. KRAMER: The letters are housed in a software
20 system that is owned by Progrexion. But in terms of who
21 wrote or who reviewed and approved the letters --

22 THE COURT: That's a different question.

23 MS. KRAMER: It is, Your Honor, but I think it's a
24 crucial one when we're talking about what does Lexington Law
25 do for its clients.

1 THE COURT: What does Progrexion do? Progrexion
2 sends the letters.

3 MS. KRAMER: The system does, Your Honor, that's
4 correct.

5 THE COURT: And Progrexion owns the system?

6 MS. KRAMER: It does own the software system. But
7 Progrexion offers, as agents of Lexington Law, acting at
8 Lexington Law's direction --

9 THE COURT: Is Progrexion practicing law?

10 MS. KRAMER: No, it is not, Your Honor.

11 THE COURT: Okay. How is it offering services on
12 behalf of the law firm?

13 MS. KRAMER: So the letters that are in the
14 systems, and it's the software that's owned by Progrexion,
15 the substance, the letters are controlled by Lexington Law.

16 THE COURT: Well, who tells me that in all of the
17 depositions that you folks have taken? Who ever tells me
18 that?

19 MS. KRAMER: Not every witness was deposed that we
20 intend to put on at trial, Your Honor. But I can tell you
21 at trial you will hear from witnesses like --

22 THE COURT: No. We're going to pretry the matter.
23 I want to know who tells me that the letters are owned by
24 Lexington Law.

25 MS. KRAMER: Yes. So you can hear that from

1 witnesses like John Heath, who is on defendants' witness
2 list. John Heath, who's the principal at Lexington Law.

3 THE COURT: I know who John Heath is. But I'm
4 curious because the matter in which the whole process
5 starts, and you can say somebody looked at the letters, but
6 nobody looks at the letters when they're sent automatically,
7 in quotation marks. We have a judgment call from a machine.

8 MS. KRAMER: Yes, Your Honor, a machine that has
9 been programmed by --

10 THE COURT: I understand that. I understand that.
11 We're talking about marketing legal services.

12 MR. BENNETT: Your Honor --

13 THE COURT: I thought she was the spokesman.

14 MR. BENNETT: She is, Your Honor.

15 THE COURT: All right. Let her speak. You can
16 sit down and speak after she's spoken.

17 MR. BENNETT: Thank you, Your Honor.

18 MS. KRAMER: May I have the Court's indulgence to
19 confer with my colleague for one moment, Your Honor?

20 THE COURT: Well, sure. I thought you were
21 prepared. Go ahead and consult.

22 MS. KRAMER: I am, Your Honor. Thank you.

23 In terms of what happens at the direction of the
24 lawyers, Your Honor, what is Lexington Law doing for its
25 clients with respect to these letters and the letters that

1 are sent out, all of the letters that are housed within the
2 system, form letters that are then sent out on behalf of
3 clients are all either written or approved by Lexington Law
4 in terms of which letters --

5 THE COURT: Who owns them?

6 MS. KRAMER: Again, they are controlled by
7 Lexington Law.

8 THE COURT: No. Who owns them?

9 MS. KRAMER: I'm having a little bit of trouble
10 with that question, Your Honor, because I think in terms of
11 where they're housed, they're housed in the software system
12 that's owned by Progrexion. I think of it this way,
13 Your Honor, in a more maybe traditional legal context.

14 Often you may have a paralegal or a secretary who
15 has certain form filings that a lawyer might use in a
16 variety of different cases. They could be fairly standard
17 filings, for example, a certificate of service.

18 Now I may not have on my computer a form
19 certificate of service, but I know that my secretary or my
20 paralegal, who work, in part, at my direction, have a copy
21 there. And I will often direct that paralegal or that
22 secretary to please create and generate a certificate of
23 service for this filing or this case.

24 In terms of how the Lexington Law business is
25 built and scaled and is able to offer services to consumers

1 in this manner, there are letters that have been either
2 written or reviewed. And also it's not just the content of
3 the letters that's controlled by the lawyers of Lexington
4 Law. In terms of the cadence, how often those letters are
5 sent out, in terms of which letters will be most effective
6 potentially for a particular client, that is all based on
7 lawyer direction and lawyer input. It's based on over
8 20,000 data points that Lexington Law has, having done this
9 for decades.

10 So in terms of what Lexington Law and what the
11 lawyers do to serve their clients and serve consumers, it's
12 in the substance of those services in terms of letters or
13 challenges that are sent out to creditors and credit
14 bureaus.

15 So, Your Honor --

16 THE COURT: Who bills the client?

17 MS. KRAMER: The client is billed automatically as
18 counsel for the government indicated. In terms of where the
19 payment --

20 THE COURT: Who bills the client? Does Progrexion
21 bill the client?

22 MS. KRAMER: It depends on whether we're talking
23 about CreditRepair.com services or Lexington Law services.

24 THE COURT: Lexington Law.

25 MS. KRAMER: For Lexington Law, the billing and

1 the payments are -- actually the payment is made to
2 Lexington Law. Progrexion has contracted with Lexington Law
3 to provide billing services.

4 THE COURT: I understand that.

5 MS. KRAMER: So Progrexion does conduct the actual
6 billing and uses --

7 THE COURT: How do they send the bill?

8 MS. KRAMER: So for many consumers, the billing is
9 automatic. Once a consumer signs --

10 THE COURT: I don't know what automatic is. How
11 do you bill automatically?

12 MS. KRAMER: No problem, Your Honor.

13 For example, a consumer signs up with Lexington
14 Law and says I'd like to sign up for your credit repair
15 services and specifically I want to sign up for your Concord
16 Standard plan. I sign the contract, and then the contract
17 outlines when I will be billed and often for how much I'll
18 be billed.

19 THE COURT: I understand that in the contract. Do
20 you actually send a bill?

21 MS. KRAMER: In terms of a hard copy bill, no,
22 Your Honor.

23 THE COURT: You do not send a bill?

24 MS. KRAMER: No, we do not necessarily -- we don't
25 send hard copy bills to the consumers.

1 I think of it as your cable company, there may be
2 subscription services, like others that are offered, where
3 you sign an initial contract and you're billed on a monthly
4 basis. It's not necessarily that you get a paper bill, but
5 you have a form of payment, either a credit card or perhaps
6 a banking or checking account --

7 THE COURT: Credit cards are here mostly used?

8 MS. KRAMER: Yes, Your Honor. And when I say
9 they're automatic, what I mean is that at the end of a
10 particular service interval, when the client is then billed
11 for the services rendered during that interval --

12 THE COURT: How do I know what services you've
13 performed during that interval?

14 MS. KRAMER: Sure. There are a couple of ways you
15 can find out, Your Honor. One is in terms of anticipating
16 what services will be provided, it's laid out in the
17 contract. In terms of seeing what services were actually
18 provided and what was done, each client has access to a
19 client portal where it has information about the client's
20 contract, their personal information, their signature
21 information, for example, and also what letters --

22 THE COURT: Your services for the first month, and
23 the second month, and the third month, and the fourth month.

24 MS. KRAMER: That is correct, Your Honor.

25 THE COURT: And I'm interested in knowing what

1 services you perform during the second month, for example.

2 MS. KRAMER: So as a client of Lexington Law you
3 can sign on to your client portal, it's an electronic portal
4 online, and you're able to view there what exactly Lexington
5 Law has been doing on your behalf, what services have been
6 performed.

7 THE COURT: What if I don't have a computer?

8 MS. KRAMER: If you don't personally have a
9 computer, Your Honor, there are other ways to publicly get
10 online, for example, at a public library.

11 THE COURT: You don't send a bill, but you charge
12 an account?

13 MS. KRAMER: We do, based on the contract with the
14 client, Your Honor. We don't send a paper bill, but the
15 client is billed only after services have been performed.

16 THE COURT: Yes. And have you defined what
17 service you're performing the second month?

18 MS. KRAMER: Yes, Your Honor.

19 THE COURT: The third month?

20 MS. KRAMER: Yes, Your Honor. In the contract
21 with the client, there's very clear expectations laid out in
22 black and white about what will happen on a monthly basis.
23 The average number of communications sent to bureaus and
24 furnishers, for example, and for particular service
25 intervals, how many communications are to be expected. So

1 it lays out not just the first service interval, but if you
2 have two service intervals, for example, after that second
3 month. If you have four, six, ten, et cetera.

4 THE COURT: Who receives the money?

5 MS. KRAMER: In terms of the consumer's payments,
6 those go to Lexington Law.

7 THE COURT: Now that's a Lexington Law account
8 maintained by Progrexion?

9 MS. KRAMER: No. That's an account maintained by
10 Lexington Law, Your Honor.

11 THE COURT: Oh, doesn't Progrexion maintain that
12 account?

13 MS. KRAMER: Progrexion maintains accounts for not
14 Lexington Law's customers but CreditRepair.com. But for
15 Lexington Law clients, the payments are made to Lexington
16 Law, and they're deposited into, via a payment processor, a
17 Lexington Law bank account.

18 THE COURT: Okay. Who are the signators on that
19 account?

20 MS. KRAMER: Your Honor, I don't have that
21 information available, but I would be happy to track it down
22 and get it to you. I'll make a note right now.

23 THE COURT: Are they officers of defendant?

24 MS. KRAMER: I will get you that information,
25 Your Honor, and let you know the specific signatories.

1 THE COURT: Now Progrexion licenses to Heath the
2 use of proprietary items?

3 MS. KRAMER: I'm sorry, Your Honor. Can you
4 repeat that, please? I couldn't hear the beginning of your
5 statement.

6 THE COURT: Yes. They license Heath with the name
7 and the domain name. But they also, do they not, license
8 proprietary matters owned by Progrexion?

9 MS. KRAMER: Just to make sure I completely
10 understand, Your Honor, are you asking whether Lexington
11 Law, Heath PC licenses products from Progrexion?

12 THE COURT: Yes.

13 MS. KRAMER: Okay. If I may --

14 THE COURT: They talk about proprietary
15 products --

16 MS. KRAMER: Yes.

17 THE COURT: -- if I remember correctly in their
18 complaint.

19 MS. KRAMER: With the Court's indulgence,
20 Your Honor.

21 So Lexington Law, Your Honor, does license the
22 software that's owned by Progrexion, the software that's
23 been used.

24 THE COURT: And the software contains the letters.

25 MS. KRAMER: In part, Your Honor, yes. It also

1 contains the algorithms that determine which letters should
2 go out and the cadence with which certain letters should be
3 sent out.

4 THE COURT: And these are licensed to Heath?

5 MS. KRAMER: Yes, Your Honor.

6 THE COURT: Okay. And what does Heath pay for
7 that license?

8 MS. KRAMER: With the Court's indulgence, I can
9 take a look at the contracts to see if I have that
10 information available right now.

11 Mr. Schliesske, bring up JX-74.

12 Your Honor, what I'm going to put on the screen is
13 the advertising, marketing, and software licensing
14 agreement. This one is an example for CreditRepair.com I
15 can show you. I don't have the one for Lexington Law right
16 at hand, but it's a similar structure.

17 And if we look on this agreement, on page ten it
18 lays out, via contract, in black and white, the compensation
19 and taxes for licensing. Lexington Law has a similar
20 agreement. And this is all pursuant to contract. And it
21 lays out what a licensee shall pay to Progrexion in terms of
22 a budget that's agreed on on a quarterly basis. But that
23 licensing, the terms that govern it and the payment amounts
24 are all contained within contracts, Your Honor.

25 THE COURT: Well, they refer to something that

1 isn't there --

2 MS. KRAMER: If Your Honor is interested --

3 THE COURT: -- equal to 125 percent of the budget
4 agreed upon.

5 MS. KRAMER: That budget changes on a quarterly
6 basis, Your Honor. So if Your Honor would like, we can look
7 into --

8 THE COURT: I'm just curious as much as anything.

9 When Progrexion collects the money and the
10 individual puts it in the Heath account --

11 MS. KRAMER: Yes, Your Honor.

12 THE COURT: -- is that the gross amount that goes
13 into the Heath account?

14 MS. KRAMER: Yes, Your Honor. It's the entirety
15 of the payment.

16 THE COURT: Okay. Heath, in turn, has agreed for
17 them to provide advertising services?

18 MS. KRAMER: Them being Progrexion, Your Honor?

19 THE COURT: Yes.

20 MS. KRAMER: Yes. There is a separate contract
21 between Progrexion Marketing, for example, and Lexington
22 Law.

23 THE COURT: Okay. And other services that
24 Progrexion performs like bookkeeping services?

25 MS. KRAMER: That is correct, Your Honor. Other

1 Progrexion entities provide a lot of the backup house, we
2 may say, services for Lexington Law.

3 THE COURT: And the advertising services?

4 MS. KRAMER: Yes. That's done through Progrexion
5 Marketing specifically.

6 THE COURT: Okay. Now does Progrexion have
7 contracts with the affiliates that counsel referred to,
8 those who have other businesses going but refer matters?

9 MS. KRAMER: Yes, Your Honor. Progrexion has a
10 number of contracts with not just those affiliates, but many
11 other affiliates who do advertising, and other firms as
12 well, for example, Lending Tree, and others who may do
13 advertisements, or posting online, and print, via radio, et
14 cetera.

15 THE COURT: Once Progrexion gets a referral, it
16 pays the referrer a fee, does it not?

17 MS. KRAMER: If that particular consumer ends up
18 signing up for Lexington Law and then stays on and pays for
19 Lexington Law services, yes. However, just --

20 THE COURT: Who pays that?

21 MS. KRAMER: I'm sorry, Your Honor?

22 THE COURT: I say who pays that?

23 MS. KRAMER: That's pursuant to the contract
24 between Progrexion and a third-party affiliate.

25 THE COURT: Does Progrexion pay it?

1 MS. KRAMER: Yes, it does.

2 THE COURT: Okay. Does it pay it on behalf of
3 Lexington Law?

4 MS. KRAMER: I don't believe so, Your Honor. That
5 is a contract directly between Progrexion Marketing and
6 whatever the third-party affiliate is. Lexington Law is not
7 a party to those contracts.

8 THE COURT: Okay.

9 MS. KRAMER: Your Honor, I'm happy to --

10 THE COURT: What I'm curious about, does anybody
11 from Lexington Law pay any of the fee that Progrexion pays
12 or reimburses Progrexion for the fee that Progrexion pays to
13 the affiliate?

14 MS. KRAMER: There is no direct connection there
15 in terms of payments made by Lexington Law, specifically for
16 a consumer who came in through a particular third-party
17 affiliate.

18 THE COURT: Is there an arrangement between
19 Progrexion and Heath?

20 MS. KRAMER: Yes, there is, Your Honor, for all of
21 Progrexion's marketing services that are provided to
22 Lexington Law.

23 THE COURT: Does that include the \$100 somebody
24 mentioned a while ago to an affiliate?

25 MS. KRAMER: That amount depends on the affiliate

1 and depends on the payment structure. But in terms of the
2 amount of money that is paid by Lexington Law --

3 THE COURT: And I've had fun, as I'm sure you have
4 had, in reference to figuring out who's on first and trying
5 to identify the actual functions of the actual entity and
6 the actual person, and I've been curious as to, okay, we
7 talked to somebody and we'll help you write a letter, but
8 we'll write it in your name and we'll send it to a creditor
9 or a vendor that you dispute. We sign your name to it. And
10 when the creditor responds, they don't send it to us. They
11 send it to you. And under your contract you're supposed to
12 let us know what you hear.

13 MS. KRAMER: That is correct, Your Honor.

14 THE COURT: Okay.

15 MS. KRAMER: One thing I'll note -- you mentioned
16 signing on behalf of the client, right? I'll note two
17 things. Number one is that those signatures are generated
18 only with the client's permission and consent. And second,
19 the client actually --

20 THE COURT: That's part of the contract, isn't it?

21 MS. KRAMER: Correct. But also the client has
22 even a little bit more control over what that signature
23 looks like. In the client portal that they can access
24 online, the client can go in, for example, and change the
25 text or the font of their signature that they would like to

1 appear on those letters. So, again, this is just one
2 example of how the client does have control and can get
3 direction in terms of the efforts that are made on their
4 behalf.

5 THE COURT: But the efforts at that point in time
6 are the Progrexion efforts?

7 MS. KRAMER: No, Your Honor. Those are Lexington
8 Law's efforts. There may be Progrexion agents -- Progrexion
9 employees who are working as agents at the direction of
10 Lexington Law, just as there are paralegals and other
11 employees of Lexington Law who work at the direction of
12 attorneys, but those are efforts by Lexington Law.

13 THE COURT: Okay. Who pays their salary?

14 MS. KRAMER: When you say their, Your Honor, which
15 specific employees are you referring to?

16 THE COURT: The employees who are on the
17 telephone, that have been referred to a person, are chatting
18 with a person and getting the setup fee, and getting the
19 card identification, arranging to pick up the credit report
20 for 12 or \$15, that person. Who's that person paid by?

21 MS. KRAMER: Yeah. So right now, Your Honor,
22 those folks are Progrexion Teleservices representatives.
23 They're employed by and paid by Progrexion.

24 If it's all right, Your Honor, I would like to
25 address briefly that credit report that you mentioned

1 because there were some statements made about that credit
2 report from TransUnion.

3 One thing I want to be clear on is in terms of the
4 sale of that credit report to a consumer, Progrexion is a
5 certified reseller of TransUnion credit reports, meaning
6 that Progrexion can sell and can offer any consumer a copy
7 of their full TransUnion credit report.

8 Now when a consumer calls, for example, or comes
9 in through an affiliate channel and is speaking with a
10 Progrexion Teleservices representative, initially the credit
11 consultation that that consumer receives is based on a
12 general TransUnion score and summary that's free.

13 Then the Teleservices representative will offer to
14 the consumer, if you'd like, for a fee, I can pull your full
15 TransUnion credit report and we can go into a more in-depth
16 consultation. Some consumers choose to do that. Some do
17 not. There are some consumers who choose to have Progrexion
18 pull that full TransUnion report, and then they never sign
19 up for Lexington Law services, and that's fine. In fact,
20 two-thirds of the consumers who end up speaking with
21 Progrexion Teleservices representatives get a free credit
22 consultation. Some may purchase a full TransUnion credit
23 report, but then they never sign up for Lexington Law
24 services.

25 So I just want to be very clear that in terms of

1 those TransUnion full credit reports and how they're sold,
2 that is a reselling agreement that Progrexion has and is
3 offering to consumers, but it's not necessary that the
4 consumer has to sign up for Lexington Law and then pay that
5 fee to get the TransUnion report. I just want to be very
6 clear about that.

7 THE COURT: In order to gather information, you
8 need a report?

9 MS. KRAMER: That is correct, Your Honor.

10 THE COURT: Whether it's free or whether it's paid
11 for.

12 MS. KRAMER: So as part of the contracted for
13 services between the client and Lexington Law, Lexington Law
14 periodically pulls credit reports from not just TransUnion
15 but the other credit bureaus as well, and that's covered as
16 part of the services that are offered to the client.

17 THE COURT: Well, counsel just suggested that
18 there was a markup.

19 MS. KRAMER: There is, Your Honor.

20 THE COURT: And I don't know what that is, but she
21 suggested it may have cost you \$2 rather than 12 or 15.

22 MS. KRAMER: I believe that's correct, Your Honor.
23 I don't have at my disposal at this moment but can get you
24 the exact numbers on that. Again, that's a reseller
25 agreement in terms of Progrexion reselling a credit report

1 to any consumer, not necessarily just customers of Lexington
2 Law. And that's something that many private companies and
3 entities have with the credit bureaus where they will have a
4 contract to be a certified reseller of credit reports.

5 THE COURT: But it happens.

6 MS. KRAMER: It does, Your Honor.

7 THE COURT: It happens without payment.

8 MS. KRAMER: There are some companies or services
9 that may offer consumers a free credit report as part of,
10 for example, consumers providing their data or providing
11 information to that company, and then they're provided a
12 free credit report, often from one bureau. That is
13 definitely a service that is out there, Your Honor.

14 THE COURT: Yes. The information gathering
15 process is with the employee of Progrexion.

16 MS. KRAMER: In terms of the information gathered
17 from the client during that initial intake call, yes,
18 Your Honor. There is a script and a fillable form that the
19 Progrexion Teleservices agent walks through, and those
20 questions and data points are, for example, data points that
21 Lexington Law has learned over the years can help inform
22 which letters or which efforts would be most effective for
23 that consumer.

24 MS. KRAMER: I know Your Honor asked about the
25 employees who are on the calls, who employs them and who

1 pays them. Just to make sure our record is clear in terms
2 of subsequent calls that a client may have after their
3 initial sign-up and their initial intake, those calls go to
4 Lexington Law paralegals, and often they speak with
5 Lexington Law attorneys. Those employees are employees of
6 Lexington Law. They are hired and paid by Lexington Law.

7 So I just want to be clear when we're talking
8 generally about a phone call a consumer may have, depending
9 on the phone call, they may be speaking to a Lexington Law
10 employee.

11 THE COURT: I understand.

12 Now in the pleadings, and I could be
13 misremembering, but I thought in the pleadings it was a
14 suggestion that Progrexion employed as many as 1200
15 telephone operators.

16 MS. KRAMER: At a particular point in time, yes,
17 Your Honor, and more than that over the years.

18 THE COURT: Okay. And roughly speaking, if you
19 know, what do they employ now?

20 MS. KRAMER: If you'd give me a moment,
21 Your Honor, I can see if I have that information readily
22 available.

23 We're investigating to try to get you an exact
24 number, Your Honor, but I believe it's approximately 1,000.
25 I will confirm that, though, and can report back.

1 THE COURT: So that you're busy.

2 MS. KRAMER: In terms --

3 THE COURT: There's enough interest to employ a
4 thousand people, roughly, on the telephone?

5 MS. KRAMER: Oh, yes, Your Honor. Progrexion
6 Teleservices handles millions of calls, many of which are
7 direct inbound calls from consumers who are calling because
8 they're interested in learning about or signing up for
9 credit repair. There's definitely a need and an interest
10 level that sustains that many employees.

11 THE COURT: And you advertise. Are the services
12 advertised in all 50 states?

13 MS. KRAMER: I'm not sure if the services are
14 advertised, for example, in print or on radio in all 50
15 states, but the services are advertised in a variety of ways
16 online, including direct brand advertising where Lexington
17 Law, for example, does, via Progrexion Marketing, direct
18 advertising online in various ways for its services.

19 So to your question, to the extent we're
20 considering Internet advertisements as well, yes, it is.

21 Your Honor, I'm happy to answer additional
22 questions or explain further our services or various facts
23 about our business. With respect to Count 1, though, I do
24 have a few additional points that I'd like to offer.

25 THE COURT: Yes, please do.

1 MS. KRAMER: Thank you very much.

2 So in terms of Count 1, that particular regulation
3 and the promised results in Romanette (ii), defendants'
4 position, and we've briefed this and argued this
5 extensively, is that based on the unambiguous, clear reading
6 of the statute, that portion does not apply to defendants.
7 We think it's in black and white. As you saw in our
8 engagement agreements with clients, we do not promise
9 results, and that that record is very clear.

10 I will say, though, that at a minimum -- at a
11 minimum -- and, again, we do believe the record is clear,
12 the government mentioned in their presentation that there's
13 no factual dispute potentially relevant to Count 1. In the
14 event that the Court believes that promised results are, in
15 fact, as laid out in black and white, a crucial component of
16 this particular regulation, while we maintain that it's very
17 clear we do not promise results, at a minimum there could be
18 a factual dispute as to whether, in fact, the defendants did
19 promise results to consumers.

20 So I just want to address the idea that there's no
21 factual dispute in principle. And, in the first instance,
22 we do agree with that and believe that the regulation does
23 not apply to the defendants. But if Your Honor is inclined
24 to think that promised results could, maybe depending on the
25 facts, go one of two ways, then that would be a live,

1 factual issue for the jury. And that's why in the proposed
2 pretrial order there are a couple of questions that are fact
3 in law about whether, in fact, the defendants do promise
4 results.

5 I also recall that the government mentioned that
6 much of the pretrial order -- or much of the case is all
7 about Count 1, and that if the Court were to dispose of
8 Count 1, for example, it would significantly narrow the
9 case.

10 I do want to point out, Your Honor, that in fact
11 the majority of the contested issues of fact and law in this
12 case, as Your Honor may have seen in the pretrial order, are
13 not concerning Count 1. They're concerning Counts 2 through
14 5. And so there is still a very significant case on the
15 table for the Court's consideration and the jury's
16 consideration potentially as to Counts 2 through 5.

17 THE COURT: We're going to take up each of those
18 in sequence.

19 MS. KRAMER: No problem, Your Honor.

20 I just wanted to say, though, that as to which
21 portions of the proposed pretrial order specifically address
22 Count 1, if you'd like, I'm happy to walk through the
23 specific disputed issues of fact and law, if it would be
24 helpful to the Court.

25 THE COURT: As to Count 1.

1 MS. KRAMER: Yes, Your Honor.

2 THE COURT: Go ahead.

3 MS. KRAMER: All right.

4 If we look, beginning on page 23 -- it's page 25
5 of the entire filing, but internal page 23 of the proposed
6 pretrial order -- thank you, Mr. Schliesske.

7 It's also up on the screen, Your Honor, for
8 convenience.

9 We're looking at Section 4(a), contested issues of
10 fact. The first two issues that are listed there
11 specifically apply to Count 1, do defendants represent that
12 all services would be provided to a consumer in a given time
13 frame, and if so, what was that time frame. That references
14 specifically Romanette (i) of the regulation.

15 Then second, do defendants promise results to
16 clients or customers, and if so, what results do they
17 promise. Those are the two contested issues of fact that
18 apply specifically to Count 1.

19 The remaining contested issues of fact, at least
20 as contended by both parties, apply to Counts 2 through 5.

21 THE COURT: How do you define results?

22 MS. KRAMER: In terms of the results that may be
23 promised to a particular client, other companies, for
24 example, Your Honor, will say we will raise your credit
25 score a certain number of points. We guarantee it within 30

1 days. We will definitely remove at least ten negative items
2 from your credit report. Those are the types of results
3 that other companies do promise. Thus they are subject to
4 this regulation.

5 THE COURT: You say we'll help you write a letter.
6 What if you get a response to the letter, is that a result?

7 MS. KRAMER: It depends on what their response may
8 be and what the effect may be for the consumer. But in our
9 contract we say we don't promise that you'll get a
10 particular result because that is not in Lexington Law's
11 control.

12 THE COURT: You say we're going to help you write
13 a letter. We're going to contest items one, three, and five
14 on the report.

15 MS. KRAMER: That's correct, Your Honor.

16 THE COURT: Then we're going to ask either for a
17 verification or we're going to ask in some fashion for a
18 demonstration. We're going to send this to the bureau and
19 they're going to, we hope, respond. You send them the
20 letter. You ask for a response. You get a response. The
21 response says you're all wet. They're valid obligations.
22 Is that a result?

23 MS. KRAMER: It is, Your Honor, for many
24 consumers, because part of the services we offer is not just
25 providing letters that result in removal of negative trade

1 lines. It also provides for a consumer, in some instances,
2 what's called an item verification, and that may be the
3 response that comes back from a creditor or credit bureau.
4 That is a valuable service for many consumers.

5 THE COURT: It is. But that's a result, isn't it?

6 MS. KRAMER: It can be a result, Your Honor, and
7 many of our clients do get those types of results. But
8 there's a difference between promising or guaranteeing a
9 result as a matter of contract, as a matter of what's
10 represented to consumers.

11 THE COURT: What's the anticipation when you write
12 a letter?

13 MS. KRAMER: The anticipation is that the bureau
14 or the furnisher may respond, may provide a verification,
15 may ultimately remove a trade line.

16 THE COURT: Do they respond within a time frame?

17 MS. KRAMER: Well, ideally, yes, Your Honor. Our
18 contract tells our consumers, our clients in black and
19 white -- and we don't need to bring it up. I will read it
20 very briefly, Your Honor. In that same paragraph we were
21 looking at earlier explains the bureaus or furnishers may
22 not respond to initial or subsequent communications, and
23 ultimately --

24 THE COURT: My question is do they have a duty to
25 respond?

1 MS. KRAMER: Do they ever --

2 THE COURT: Do they have a duty?

3 MS. KRAMER: Do they have a duty to --

4 THE COURT: An obligation to respond to a dispute,
5 or a verification request.

6 MS. KRAMER: With the Court's indulgence,
7 Your Honor.

8 In terms of an obligation to respond, Your Honor,
9 at times the bureaus or furnishers do have an obligation to
10 respond, but they do not have an obligation to respond to
11 letters in many instances.

12 THE COURT: How about queries from nice people who
13 are assisting others in making a request that is often sent
14 by email?

15 MS. KRAMER: Emails that may be sent to the credit
16 bureaus or creditors, again, Your Honor, are governed by a
17 particular set of requirements. Certain communications,
18 depending on the substance and the time frame, there is a
19 requirement that the bureau or furnisher respond. But for
20 many others, there is not. And Lexington Law can't control
21 what the bureau or furnisher does at the end of the day,
22 which is why we make that very clear to our clients.

23 THE COURT: But you're going to help me write a
24 letter and I'm disputing three items, or I've requested
25 verification on at least one item directly to a creditor,

1 for example, but no answer as a result, I assume.

2 MS. KRAMER: In this instance, Your Honor, if
3 there are three communications sent out and the client does
4 not get a response to any of those communications, that is
5 definitely a possibility. Sometimes they may get a response
6 to a subsequent communication, and that's why our services
7 do, based on our analysis and data points for years,
8 determine a good cadence for sending out repeated letters or
9 challenges. But it's entirely possible that a bureau or
10 furnisher does not respond.

11 THE COURT: Why don't you use your own name when
12 you send a letter assisting a client? Why don't you say
13 Heath, or Lexington, or indeed CreditRepair?

14 MS. KRAMER: One of the primary reasons,
15 Your Honor, we have learned throughout the years based on
16 experience, a client is most likely to get a response and
17 get action on a letter if it does, in fact, come from that
18 client and come in their own name.

19 THE COURT: Okay.

20 MS. KRAMER: And part of our zealous advocacy --

21 THE COURT: How do I know if you're an attorney
22 asking for a response?

23 MS. KRAMER: If you're the credit bureau or the
24 creditor?

25 So I think there are two different possibilities

1 here. One in terms of a letter that's sent just on the
2 client's behalf with the client's name and signature, the
3 bureaus or the creditors don't necessarily know -- I should
4 say the creditors, that it's coming from Lexington Law in
5 terms of the logistics of how that's generated and sent out.
6 Lexington Law does have special relationships specifically
7 with the credit bureaus, the big three, where there are
8 contracts, and they've set up an electronic platform so that
9 there are specific letters that come directly from this
10 platform from Lexington Law to the credit bureaus. Those
11 are still, again, in the client's name. Those are still
12 signed by the client, again. The one primary reason is that
13 we know that to be the most effective way. But any
14 communications that are coming through that specific
15 proprietary platform do come through Lexington Law.

16 THE COURT: Yes. Do you respond to them? Do they
17 get a carbon copy, using old-fashioned terms, of the letter
18 that you sent to the client?

19 MS. KRAMER: When you say they, does the client
20 get a carbon copy?

21 THE COURT: No, no. Does Lexington Law get a copy
22 from the bureau?

23 MS. KRAMER: So Lexington Law and Progrexion,
24 depending on CreditRepair.com or Lexington Law, they do
25 generate and have in their system copies of the letters that

1 they send out to the bureaus or to creditors.

2 THE COURT: No, no. It's the bureau responding --

3 MS. KRAMER: The response, Your Honor. My
4 apologies.

5 THE COURT: -- responding to the client,
6 supposedly. The client called Lexington Law. At that point
7 in time, and you have a special platform, does Lexington Law
8 at least get a copy of what you respond to?

9 MS. KRAMER: With the Court's indulgence.

10 So in terms of a response or an action taken by
11 the credit bureaus, Your Honor, Lexington Law would see the
12 result in terms of, for example, a negative item being
13 removed from a credit report. That is available in terms of
14 what's provided by the credit bureaus. If there is, for
15 example, though, just a letter that is sent to a client in
16 response from a credit bureau, that's not sent in carbon
17 copy as well to Lexington Law.

18 THE COURT: Okay. Well, good.

19 Well, I'll let you take an early break. Give you
20 two minutes extra lunch. Let's reassemble at 1:30, if
21 that's convenient for everybody, and we'll see you back here
22 at 1:30.

23 MS. KRAMER: Thank you, Your Honor.

24 (Recess)

25 THE COURT: You go ahead.

1 MS. KRAMER: Your Honor, I would like to address
2 two specific points that we discussed before our lunch
3 break. The first is with respect to a question that
4 Your Honor asked a couple of times. We have talked a lot
5 about results, what is a result and what does a result mean.

6 What's really important for the pretrial order and
7 for the jury instructions and trial in this case --

8 THE COURT: That's assuming a jury.

9 MS. KRAMER: Assuming so, as to Count 1
10 specifically, which Your Honor is highlighting right now, is
11 what does the term result mean in the regulation at issue in
12 Count 1. And in order to understand what the term results
13 means in that regulation, we need look no further than that
14 portion of the regulation itself.

15 Mr. Schliesske, if you could please bring up
16 Romanette (ii) from the relevant C.F.R. portion.

17 You will see here, Your Honor, it says the seller
18 has provided -- this is of course payment can't be requested
19 or received -- until the seller has provided the person, the
20 consumer, with documentation in the form of a consumer
21 report from a consumer reporting agency demonstrating that
22 the promised results have been achieved.

23 What that language of the regulation tells us is
24 that the results at issue, what that term means is results
25 that can be demonstrated on a consumer report -- or a credit

1 report from a consumer reporting agency, such as a credit
2 bureau. So this would cover, for example, a change in a
3 consumer's credit score. That is a result that appears on
4 that consumer report on that credit report, or a negative
5 trade line or item being removed. That is a result that
6 appears on a consumer report.

7 Now what result doesn't mean in the context of
8 this regulation is something that would not appear on a
9 consumer report and thus can't be verified via this
10 documentation.

11 To give an example that Your Honor brought up
12 earlier, you asked, well, let's say a client sends a letter
13 to a credit bureau, and a credit bureau sends a letter
14 response. Is that letter response a result? In the context
15 of this regulation as it applies in Count 1 of this case,
16 no. A mere letter coming back from a credit bureau is not
17 something that appears on a consumer report. So that is not
18 the type of result as that term is defined in this statute.

19 Now our contracts, when we're talking about
20 Lexington Law's contracts with its clients, contains the
21 word result. We looked at that earlier today. Now the term
22 result in our contracts, or the term result as it might be
23 used colloquially or understood by a consumer, could mean
24 more than just something that would appear on a consumer
25 report.

1 So when you're talking about what does the term
2 result mean, for example, in a different context, in the
3 context of our contracts with clients, that term result is
4 defined more broadly than just what's at issue in Count 1
5 and in this regulation.

6 So as to the Court's specific question and to put
7 a fine point on it for the purpose of Count 1 in this case
8 and in the pretrial order and what's the issue, the issue is
9 have the defendants promised results. Has promised results
10 or result is defined, in this particular portion of the
11 regulation, meaning something that is verifiable via
12 documentation on a credit report.

13 THE COURT: Okay. What's the purpose of the
14 letter?

15 MS. KRAMER: The letter that is sent on behalf of
16 the client to the credit bureau or to the creditor? It
17 depends on the type of letter that's sent, Your Honor. A
18 few different types.

19 There could be an item verification letter that's
20 sent, that's sent out to a creditor or credit bureau that
21 says this particular trade line or, you know, line on this
22 consumer's credit report, we'd like to see -- the consumer
23 would like to see the documentation from the creditor
24 verifying this debt or verifying this particular item.

25 There could be letters also that go out,

1 especially after receiving certain information about the
2 veracity of a trade line, that's a specific challenge to a
3 trade line that says we believe this is incorrect.

4 So depending on the context, the letters
5 themselves can serve different purposes.

6 THE COURT: But you are expecting a change in the
7 credit report as the result of one type of letter?

8 MS. KRAMER: If there is an unverifiable or a
9 false trade line, for example, on a consumer's credit
10 report, then our hope would be -- although we can't make a
11 promise or a guarantee to a consumer, our hope would be that
12 the credit bureaus remove that trade line.

13 Now there are instances where a client might say I
14 don't know if that's true, I don't believe it. We get the
15 verification, and you know what, it's true. Lexington Law
16 makes very clear that we are not going to try to remove
17 accurate trade lines and accurate information. That
18 wouldn't be ethical and it wouldn't be correct.

19 There is -- I'm sorry, Your Honor. I didn't mean
20 to preempt you.

21 THE COURT: I'm thinking for the purpose of the
22 letter.

23 MS. KRAMER: Yes.

24 The one other issue, before we go too far,
25 Your Honor, that I wanted to just clarify that we discussed

1 earlier --

2 THE COURT: I appreciate that very much.

3 MS. KRAMER: Thank you, Your Honor.

4 The other issue that I'd like to just clarify,
5 Your Honor asked about whether Lexington Law advertises in
6 all 50 states, and I talked a bit about Web based
7 advertising. So one thing I want to make clear is that the
8 type of Web advertising that Lexington Law engages in is the
9 type of advertising that law firms all across the country,
10 including law firms in the State of Utah, engage in, posting
11 a law firm website, putting advertisements or posts on
12 Facebook, for example, or LinkedIn, and it's perfectly
13 acceptable for law firms to use the Internet to post these
14 types of advertisements or to try to target particular
15 potential clients.

16 THE COURT: When it first started out a long time
17 ago, that would be justification for losing your license.

18 MS. KRAMER: It may have been years ago.

19 THE COURT: I'm just commenting.

20 MS. KRAMER: I will say, Your Honor, that one
21 thing that Lexington Law does for all of its advertising,
22 all of the advertisements that are sent out, whether it's on
23 the Internet, via print advertisements, they're all reviewed
24 by outside counsel -- by an independent outside counsel who
25 is a Utah Bar attorney and Utah licensed attorney to ensure

1 that those advertisements are reviewed for ethics and for
2 compliance with whatever relevant statutes or regulations
3 apply.

4 So in terms of ensuring that the advertising
5 practices of Lexington Law, even when they're carried out by
6 Progrexion, are in line with ethical requirements, that is
7 something that the company has hired outside counsel to
8 ensure and we're very concerned about.

9 THE COURT: If you send a letter, you're expecting
10 something.

11 MS. KRAMER: I think that everyone has a hope of a
12 response when they send a letter in any respect, Your Honor.

13 THE COURT: You're engaging in hope.

14 MS. KRAMER: We are. We're engaging in our best
15 efforts to zealously advocate on behalf of clients, which is
16 what all lawyers do.

17 As I'm sure Your Honor is more than familiar,
18 lawyers all around the country, including lawyers in Utah,
19 often have a sentence in their engagement letter that says
20 we cannot promise a particular outcome or result in a case.

21 Similarly here, for clients of Lexington Law,
22 since we are sending letters and making requests often on
23 behalf of clients to third parties, we can't control what
24 those third parties are going to do. Just as attorneys
25 here, we can't control the outcome of a case.

1 THE COURT: You're hoping.

2 MS. KRAMER: Of course, Your Honor.

3 THE COURT: There's a consequence as a result of
4 the letter plus the hope. There's a consequence. It may be
5 affirmative, it may be negative, it may be something else,
6 but there's a consequence for sending it otherwise you
7 wouldn't send it.

8 MS. KRAMER: Well, the hope, I think, in part,
9 Your Honor, is that there is a consequence, be that a
10 response from the credit bureau, be that a result in terms
11 of a change in the credit report. But sometimes,
12 Your Honor, the consequence could just be the client knowing
13 that they have an attorney out there, or just a company out
14 there working as best as they can to advocate for that
15 client, and the client is doing everything that they can to
16 learn about and potentially clean up their credit report.
17 That in and of itself is a consequence of our services.

18 THE COURT: Well, that's interesting.

19 I'm always curious as to how an attorney can talk
20 to 100,000 clients.

21 MS. KRAMER: I think that's a great curiosity,
22 Your Honor, and part of it, I think -- part of what might
23 help is taking a step back and making sure we're examining
24 this legal practice in the right lens.

25 Traditionally there's this view of a law firm as a

1 certain collection of however many attorneys, you work with
2 a discrete amount of clients, and you offer your legal
3 services. In today's age there's a huge demand -- we talked
4 about the number of consumers who call into our
5 telemarketing services, there's a huge demand for assistance
6 in terms of credit repair, and there's a market and a need
7 for legal services and legal advice here.

8 But, frankly, Your Honor, it wouldn't be
9 economical or possible for lawyers to provide this quality
10 and this level of legal assistance and legal services to
11 every average consumer out there in the United States who
12 might need it.

13 So in terms of how Lexington Law and how this
14 legal practice and this company was set up, it's with the
15 idea of how can we design a company, a law firm, a practice
16 that can give legal services to as many consumers as
17 possible for a price point that actually makes sense.

18 THE COURT: And after you collect the money on
19 behalf of Heath --

20 MS. KRAMER: Yes, Your Honor.

21 THE COURT: -- and it goes into a separate
22 account, you tell me that Heath -- the Heath account.

23 MS. KRAMER: Correct, Your Honor.

24 THE COURT: You were going to tell me who writes
25 the checks on that account.

1 MS. KRAMER: The signatory, Your Honor, I believe
2 you asked. I was able to confirm with our clients that the
3 signatory to that account is John Heath himself or an agent
4 acting at John Heath's direction.

5 THE COURT: Name the agent.

6 MS. KRAMER: So currently, Your Honor, I can tell
7 you one agent who is acting at his direction is named Jared
8 Hartley.

9 THE COURT: Who does he work for?

10 MS. KRAMER: He's the agent of John Heath for the
11 purpose of --

12 THE COURT: Who does he work for?

13 MS. KRAMER: If Your Honor will give me one
14 moment.

15 THE COURT: Okay.

16 MS. KRAMER: I'll get that information for you,
17 Your Honor.

18 THE COURT: Once it's placed in the separate
19 account, how's that shared with Progrexion?

20 MS. KRAMER: So Progrexion has contractual
21 relationships with Heath --

22 THE COURT: What's the share? What's the share?
23 How is that shared?

24 MS. KRAMER: In terms of the payment structure,
25 there's not a set share percentage in terms of Progrexion

1 gets 50 percent of that account. That's not how it works.

2 THE COURT: Tell me how it works.

3 MS. KRAMER: Happy to, Your Honor.

4 So what happens is all those payments go into a
5 bank account for John Heath and for Lexington Law. That
6 money is then utilized by Heath and by Lexington Law to, as
7 any business would do, pay off various expenses, be it
8 employee salaries, overhead, paying on contracts with
9 certain vendors, licensing fees. So just one of those
10 expenses that Lexington Law has is its contract with
11 Progrexion Marketing, for example.

12 There are also contracts with other Progrexion
13 entities, but just Progrexion Marketing as an example,
14 there's a set contract. And so each year there's a payment
15 plus structure where there's a set based fee payment that
16 Lexington Law will make to Progrexion. And then there's
17 kind of a plus percentage based on a number of factors that
18 varies by quarter. So in terms of what proportion of
19 that --

20 THE COURT: How was it shared last year? How was
21 it shared? How was it agreed to be shared this coming year?

22 MS. KRAMER: Yes. So the agreement per the
23 contract is there's a particular flat fee, which I'll
24 confirm but I believe is \$100 million for marketing services
25 of all sorts, in all respects, for example, plus a

1 particular percentage. And I don't have at hand,
2 Your Honor, what that is.

3 THE COURT: Who would have that?

4 MS. KRAMER: Who would have that? My clients
5 would, Your Honor, the company.

6 THE COURT: Well, ask them.

7 MS. KRAMER: Happy to. Thank you.

8 Your Honor, we're contacting the representative of
9 the company who would have those numbers. His name is
10 Mr. Chad Wallace. He's the CFO, and he is one of the
11 individuals on our witness list who will testify to these
12 issues at trial. We're looking into that right now,
13 Your Honor.

14 THE COURT: Okay. I'm curious as to how that's
15 shared. And I would be interested in who writes that check,
16 if it's a check, whether Mr. Heath signs it or whether his
17 agent, in quotation marks, signs it.

18 MS. KRAMER: So his agent, Your Honor,
19 Mr. Hartley, we've confirmed Mr. Hartley is employed
20 actually by Progrexion ASG, one of the defendants in this
21 case. That's one of the entities at Progrexion, as I
22 mentioned earlier, that does some kind of like the back
23 office, the finance and accounting, and such.

24 THE COURT: So Progrexion can sign the checks for
25 the law firm?

1 MS. KRAMER: For Progrexion ASG, purely with
2 respect to that particular account, yes.

3 THE COURT: That particular account, Progrexion
4 signs that?

5 MS. KRAMER: That individual, Mr. Hartley, is a
6 signatory on that account, yes.

7 In terms of the share, I know Your Honor is very
8 curious about how it's shared, maybe one thing that might
9 help clarify is Lexington Law's account isn't shared
10 necessarily or split in terms of a pot with the Progrexion
11 entities. Any payments or monies that flow from Lexington
12 Law to the Progrexion entities are set based on contractual
13 relationships.

14 THE COURT: I understand that. They've got a
15 contract. One of the interesting sections in the suggested
16 form of pretrial order, on pages ten and 11, it says Heath
17 PC contracts with PGX Holdings' subsidiaries, including
18 defendants Progrexion Marketing and Progrexion Teleservices,
19 to, one, have Progrexion market, telemarket, and sell over
20 the telephone the credit repair services that Lexington Law
21 provides. Now you've given me a view of the contract that
22 purports to define what the services are.

23 Then it goes on to say, two, on page 11, use,
24 Progrexion's proprietary credit repair products, and the
25 trade name and the domain name, and then obtain other

1 business services, such as payment processing and payroll
2 services.

3 And I am eager to have you tell me what credit
4 repair products are Progrexion's proprietary credit repair
5 products.

6 MS. KRAMER: Sure, Your Honor.

7 The primary ones are ones that we were talking
8 about earlier today, the software that's used and the
9 algorithm that's used in terms of generating and identifying
10 the correct letters to send out to bureaus on behalf of
11 consumers. Those are the key I'll say credit repair
12 products that are proprietary to Progrexion.

13 THE COURT: That's something that you provide to
14 the law firm?

15 MS. KRAMER: That Progrexion licenses, yes, and
16 provides to the law firm.

17 THE COURT: To the law firm.

18 MS. KRAMER: It's just as, for example -- to use
19 another example from the legal industry, there are a number
20 of products like West Law, or Lexus Nexus, they're case data
21 repositories, and law firms or lawyers can license those
22 products so that they can use them.

23 To put maybe a finer point on an analogy, in the
24 bankruptcy context, for example, there's a product that's
25 used by bankruptcy attorneys where you get a license for the

1 software, you plug in a client's financial information and
2 personal information, and that software will generate the
3 proper bankruptcy filing forms that you would file in court
4 to file for bankruptcy for that client.

5 Similarly, Lexington Law licenses and has the
6 authority to use the proprietary software products that are
7 owned and offered by Progrexion, and they do so in their
8 provision of legal services.

9 THE COURT: Okay. What's the license fee for the
10 use of those proprietary products?

11 MS. KRAMER: I believe we took a look at that
12 earlier, Your Honor. The 125 percent figure you may
13 remember, we're investigating to see if we can find what
14 that exact number was for this past quarter, because per the
15 contract, it does change on a quarterly basis.

16 MS. McOWEN: Your Honor, I believe we have that
17 figure, if it would be helpful.

18 THE COURT: I can't hear you.

19 MS. McOWEN: I believe we have that figure. If it
20 would be helpful, we could pull up -- I believe it's JX-12,
21 page two.

22 I believe it says, Your Honor, that the payment is
23 \$20.83 per month, per user -- per active customer user, with
24 a floor of \$1.1 million per month.

25 THE COURT: Per month?

1 MS. KRAMER: And just to be clear, Your Honor, the
2 \$20.83 per month is for active users on our core products,
3 which can be known as our credit repair products. The
4 company also offers what are called care products or
5 monitoring products that similarly are licensed from
6 Progrexion. And that's credit monitoring services, which
7 many of our clients choose to use.

8 THE COURT: Whose actually rendering the service?
9 I get mixed up, quite frankly, as we deal with the parties
10 and the operation as to who does what, when, and for what.
11 And it's fascinating that the credit repair products include
12 the letters that you license to the law firm, who
13 purportedly has examined and approved the letters in some
14 fashion over the years. But the law firm doesn't press the
15 button to send the letter out to the credit bureau, does it?

16 MS. KRAMER: The law firm itself?

17 THE COURT: The law firm itself.

18 MS. KRAMER: Agents of the law firm do,
19 Your Honor.

20 THE COURT: Which agents?

21 MS. KRAMER: It can be --

22 THE COURT: The telephone agent?

23 MS. KRAMER: It can be, for example, Progrexion
24 Teleservices agents acting under a contract as agents of
25 Lexington Law. There can be --

1 THE COURT: I'm interested in that contract. I
2 don't think I've seen that contract.

3 MS. KRAMER: I believe we have that contract.

4 THE COURT: It's probably one of the 700 that
5 people have talked about.

6 MS. KRAMER: Yes, Your Honor.

7 The other thing, Your Honor, is that you mentioned
8 the letters are licensed by Progrexion. To be clear, the
9 letters that are included in the Progrexion software
10 platform, those letters are routinely updated by attorneys.
11 There may be new letters that are drafted or put in there by
12 attorneys in response to new evolutions in either the credit
13 industry or concerns that consumers are having based on the
14 financial status of the country.

15 For example, in the last several years --

16 THE COURT: These are patterns. These are pro
17 forma letters.

18 MS. KRAMER: They are based on --

19 THE COURT: They are patterns.

20 MS. KRAMER: They are form letters, that is
21 correct, based on the lawyer's experience with what works in
22 terms of trying to get this information. And also they can
23 reflect kind of ongoing changes to the laws in the various
24 states and federal regulations.

25 There are, of course, updates that are made as the

1 credit regulations throughout the country or in particular
2 states are adjusted. There is review to ensure that the
3 letters that are sent out are reflective of those changes in
4 the law.

5 THE COURT: But they are proforma letters.
6 They're patterns.

7 MS. KRAMER: They are, Your Honor.

8 THE COURT: They say, oh, this client deserves
9 letter A. Who actually punches the computer that sends the
10 letter?

11 MS. KRAMER: So in terms of who presses, for
12 example, you know, a button that populates the consumer's
13 file and then starts the machine running to send the
14 letters, in the first instance, Your Honor, it is, nowadays,
15 Teleservices agents working on behalf of Lexington Law after
16 they have collected the information from the client.

17 It's the same way that, for example, at a legal
18 pro bono services organization, there may be non-attorney
19 intake people who will take the client's initial
20 information, fill out the forms, and fill out the particular
21 fields that the lawyers have indicated they need. And then
22 whether that's done in hard copy or electronically, it's
23 then put into a database or put into whatever needs to
24 happen next.

25 THE COURT: Something activates the sending of the

1 letter?

2 MS. KRAMER: That is correct, Your Honor.

3 THE COURT: That traditionally is your
4 telemarketing person?

5 MS. KRAMER: Nowadays it is in terms of just
6 having the client's profile fully set up such that the
7 algorithm that's been constructed by attorneys can run, and
8 it's actually --

9 THE COURT: But somebody starts that process.

10 MS. KRAMER: You're right, someone starts the
11 process, Your Honor.

12 THE COURT: Who presses the button?

13 MS. KRAMER: So when we say the button --

14 THE COURT: Well, who starts the process?

15 MS. KRAMER: That's a great question, Your Honor.

16 In terms of who starts the process, when
17 Teleservices agents input that customer's information and
18 submit it into the system, that starts the process.

19 But if Your Honor is really interested in what
20 sends out -- what happens to send out a letter, what's the
21 triggering event that sends out that letter, it's not an
22 action by the Teleservices agent. It's an action by the
23 algorithm, by the computer based on directions from the
24 attorneys. And that's how Lexington Law has been able to
25 provide legal services on a broad scale.

1 THE COURT: At that point in time the attorney has
2 not participated in reference to that particular client.

3 MS. KRAMER: The attorney has not necessarily
4 looked -- a live attorney has not necessarily looked at that
5 specific consumer file, you're correct, Your Honor, but an
6 attorney has built out and provided the instructions of what
7 to do.

8 THE COURT: I understand that. But if you're
9 talking about a law firm -- a law firm, the judgment call is
10 a computer call, then, at that point, isn't it?

11 MS. KRAMER: The judgment call is a call made by
12 attorneys and then programmed into a computer to execute.

13 THE COURT: But the call itself is by the machine?

14 MS. KRAMER: Yes, Your Honor. Once that algorithm
15 is running and following the instructions of the attorneys,
16 what's actually happening in terms of the technical carrying
17 out, it's done by the algorithm in the computer, but again,
18 only operating under the instructions and doing exactly
19 what's been directed by attorneys.

20 THE COURT: Without looking at the specific
21 client?

22 MS. KRAMER: Without a live attorney looking at
23 every individual file, yes, Your Honor. That's how the law
24 firm has chosen to utilize available technology in order to
25 make it feasible to service this many clients at a given

1 time.

2 It's similar to other -- I mentioned earlier,
3 Your Honor, there are other legal services products, for
4 example, where a paralegal or an intake person could fill in
5 a software program particular client information, and that
6 program will generate legal forms, but those legal forms
7 weren't created by the computer. Those are only being
8 generated based on the direction and inputs from attorneys.

9 THE COURT: To meet patterns?

10 MS. KRAMER: Well, when Your Honor speaks of
11 patterns, to be clear, there's over 20,000 unique individual
12 letters that are currently in the software platform that can
13 be sent out on behalf of a client. We're not talking about
14 five or six form letters. This is a very sophisticated,
15 highly specialized algorithm that really looks at the
16 individual client's needs, many different data points, and
17 figures out of all the options that an attorney could do in
18 this instance, which one is the best one based on that
19 attorney guidance.

20 THE COURT: Out of some 20,000?

21 MS. KRAMER: Over 20,000 currently, yes.

22 THE COURT: They're updated every year.

23 MS. KRAMER: Not every single letter is updated
24 every year, Your Honor, but there are updates made based on,
25 for example, changes in state regulations. So there are

1 consumers that come from different states and there may be
2 particular requirements for letters coming from a consumer
3 in that state or going to a particular creditor in a given
4 state.

5 THE COURT: Does somebody rap on Heath's door for
6 help when they have a complaint or is the matter referred
7 routinely to the live people?

8 MS. KRAMER: So if a consumer calls in with a
9 complaint and they would like to speak to an attorney, they
10 speak with an attorney. It could be John Heath.

11 THE COURT: I understand that.

12 MS. KRAMER: It could be another attorney. So if
13 there's a complaint -- when Your Honor says a complaint, you
14 mean like from a client?

15 So if a client comes in with a complaint, there
16 are instances where there's outreach by the attorneys or by
17 paralegals to that client. Often when there's not a
18 complaint, Your Honor, there are often opportunities for an
19 attorney to get involved and interact with a client. There
20 may be a particularly complex trade line or issue that a
21 client has, and those can be escalated. We have an
22 escalation process where all the documentation has been sent
23 to one of the attorneys, and the attorneys will review that
24 and may reach out to the client to discuss.

25 THE COURT: If you're talking percentages, and you

1 may not have this information, what percentage of clients,
2 initially signed on, ever actually talk to a live attorney?

3 MS. KRAMER: You're exactly right, Your Honor, I
4 don't have that number at hand, but it's something that we
5 can look into, certainly.

6 I'm guessing -- and I don't want to speculate too
7 much, but we can also provide how that number may change
8 over time depending on the year, because a lot of it is
9 driven by client demand.

10 THE COURT: Well, I'm curious about that because
11 we're talking about marketing, and in the suggested form of
12 order, we sell over the telephone the credit repair services
13 that Lexington Law provides.

14 MS. KRAMER: Correct.

15 THE COURT: Now how do we describe those services
16 other than in your contract with the person?

17 MS. KRAMER: Of course. There's a very specific
18 script, a long script, Your Honor, that every Progrexion
19 Teleservices employee is trained on, reviews regularly, and
20 receives coaching on if there's ever any other questions or
21 issues that pop up. And in that particular script, it has
22 many explicit descriptions of what services will be
23 provided, for example, sending item verifications and
24 sending letters. So that there's a full opportunity for the
25 client not just by seeing it in a contract or hearing a

1 written contract read out loud, but that there is an
2 opportunity for conversation with the Teleservices
3 representative about the services.

4 THE COURT: Are there any services other than
5 those set forth in the contract?

6 MS. KRAMER: As to the contract between Lexington
7 Law and the consumer?

8 THE COURT: The contract that the telemarketer
9 talks to the client about.

10 MS. KRAMER: Yes. So in the case of Lexington
11 Law, because there's also CreditRepair.com and telemarketers
12 who speak about the CreditRepair.com products, but for
13 Lexington Law and CreditRepair.com, all of the services that
14 will be provided are laid out in that contract. There are
15 different levels of services laid out, but a consumer
16 doesn't necessarily sign up for all of them.

17 THE COURT: Why don't we take a moment and read to
18 me, if you will, please, the services that the telemarketer
19 sells and that the client contracts for, signs.

20 MS. KRAMER: Are you asking, Your Honor, in part
21 for what the Teleservices representative reads from the
22 contract?

23 THE COURT: Yes. I'm interested in the contract,
24 what the client signs.

25 MS. KRAMER: Yes.

1 THE COURT: And why don't you read to me, if you
2 will, please, specifically what it is that you say you're
3 going to furnish.

4 MS. KRAMER: One moment, Your Honor.

5 Mr. Schliesske, if you could please bring up
6 JX-13.

7 This is the contract document we were looking at
8 before, Your Honor. And if we go to -- let me get the page
9 number correct -- page ten of this document, you'll see the
10 section that begins services and representation.

11 THE COURT: Yeah. I'm interested in the services.

12 MS. KRAMER: Yes. And this section, Your Honor,
13 goes for approximately three and a half pages. So I'll try
14 to pull out the most relevant.

15 THE COURT: Read it slowly.

16 MS. KRAMER: Okay. If Your Honor prefers, I'm
17 happy to start at the beginning.

18 THE COURT: I'm interested in the services that
19 you say you provide.

20 MS. KRAMER: Sounds great, Your Honor.

21 So to begin, you, the client, are engaging, for
22 example, the premier plus service level described below as
23 of the date of this contract. There's information for the
24 client about how they can change the service level.

25 Then the next paragraph begins, you agree that by

1 signing this contract, you are providing Lexington with,
2 quote, written instructions in accordance with the Fair
3 Credit Reporting Act to periodically obtain your credit
4 reports from any consumer reporting agency, affiliate, or
5 third party, and to use your credit reports to provide you
6 with the services agreed to as part of this contract.

7 So in that paragraph, one portion of the services
8 that is described, Your Honor, is obtaining the credit
9 reports from the credit agencies periodically.

10 THE COURT: That's for the benefit of the vendor?

11 MS. KRAMER: Well, that's for the benefit of the
12 consumer, Your Honor.

13 THE COURT: As well. I understand that.

14 MS. KRAMER: All right.

15 THE COURT: Go ahead and get a written report.

16 MS. KRAMER: The more information that Lexington
17 Law has from those credit bureaus about the credit report,
18 the better Lexington Law can serve their clients.

19 The next paragraph talks about additional specific
20 services.

21 Mr. Schliesske, if you can please bring back up
22 JX-13, and we'll be on that next page.

23 I have a hard copy, Your Honor, and I'm happy just
24 to continue reading, or I can wait for the monitor.

25 THE COURT: I don't see anything.

1 Why don't you just read it.

2 MS. KRAMER: No problem, Your Honor.

3 Lexington performs one or more of the following
4 services before you pay: Enters your personal data and one
5 or more credit reports into its secured database; provides
6 you with a login to access your case online and to access
7 certain informative content Lexington offers its clients;
8 collects your information and instructions from you
9 regarding your particular circumstances and how you wish to
10 proceed; analyzes your case, and --

11 THE COURT: Stop there for a moment.

12 MS. KRAMER: Okay.

13 THE COURT: I'm interested in the analysis. Who
14 does the analysis? The telephone operator?

15 MS. KRAMER: There is some analysis done by the
16 Teleservices agent acting as an agent of Lexington Law, yes.

17 THE COURT: But it's the Teleservices person?

18 MS. KRAMER: On that initial call, yes,
19 Your Honor.

20 THE COURT: Yes. Employed by Progrexion?

21 MS. KRAMER: Employed by Progrexion Teleservices
22 and working as an agent pursuant to contract with Lexington
23 Law, yes.

24 THE COURT: Okay.

25 MS. KRAMER: To conclude this paragraph, if I may,

1 Your Honor, and prepares and sends one or more
2 communications on your behalf. Those letters begin to go
3 out even before the first payment comes in from a consumer.

4 THE COURT: Prepares and sends a letter on your
5 behalf?

6 MS. KRAMER: Yes, Your Honor. The term is
7 communications, one or more communications on your behalf,
8 which can include a hard copy letter, it can include an
9 electronic communication, and that term is defined in the
10 contract.

11 THE COURT: Is the alternative -- the alternative
12 available to the client or is that a choice made by the
13 telemarketer?

14 MS. KRAMER: When you say the alternative,
15 Your Honor, do you mean our other products that don't
16 involve sending communications?

17 THE COURT: Communication products. I'm going to
18 send your letter. I'm going to email your letter.

19 MS. KRAMER: So there are other products that
20 Lexington Law offers. I mentioned earlier those core
21 products. They don't involve sending letters.

22 So the contract lays out, for example, a service
23 level called Maintenance Pro and one called Report Watch.
24 For example, Report Watch is designed for clients who
25 achieved their primary credit repair goals, but would

1 continue to benefit from longer term report and score
2 monitoring and analysis.

3 So every consumer who calls up, every potential
4 client has the option of whether they want to engage
5 Lexington Law for the core services, meaning the ones --

6 THE COURT: What are the core services?

7 MS. KRAMER: The core services are the services
8 that involve those communications to the credit bureaus and
9 the creditors. It involves the item verifications and the
10 challenges, for example.

11 The care services don't involve those
12 communications, Your Honor, because there are many consumers
13 out there, especially today with --

14 THE COURT: Tell me what your contract says that
15 you're selling basically.

16 MS. KRAMER: Sure. Your Honor, the services
17 section that I was just reading from has -- if you would
18 like, Your Honor, I can go on and read the next paragraph
19 that continues to describe the services provided.

20 THE COURT: I'm interested in the services.
21 That's what's being marketed. That's what's being
22 contracted for.

23 MS. KRAMER: Correct, Your Honor.

24 Subsequently, Lexington typically performs one or
25 more of the following ongoing and periodic services as

1 appropriate in its judgment and discretion.

2 THE COURT: These are elections on the part of the
3 service provider?

4 MS. KRAMER: Working at the direction of the
5 client, yes, Your Honor.

6 THE COURT: Okay.

7 MS. KRAMER: Receives and reviews bureau and
8 furnisher correspondence.

9 THE COURT: That's part of the communications that
10 the client gets and makes available to you?

11 MS. KRAMER: Yes. Collects and reviews updated
12 information and instructions from you regarding your
13 circumstances, goals, and case.

14 And why that's important, for example, Your Honor,
15 is a credit report, just as a person's credit situation,
16 isn't static. It changes based on events in our lives.

17 THE COURT: It's a dynamic world.

18 MS. KRAMER: Exactly.

19 So when a client has a change going on, for
20 example, they may be trying to make a major purchase --

21 THE COURT: What else do you do besides respond to
22 the client? Okay.

23 MS. KRAMER: Next it says monitors and analyzes
24 your case. Provides you with status updates regarding your
25 case.

1 THE COURT: What does monitor case mean?

2 MS. KRAMER: So there are a couple of things in
3 terms of monitoring, Your Honor.

4 THE COURT: I don't get the communication back
5 from the bureau, you see. I have to rely on you to bring
6 something in to me. What are you monitoring? What are you
7 actually doing?

8 MS. KRAMER: There's one thing primarily that
9 we're monitoring, which is the client's credit reports, and
10 those credit reports that we pull periodically from the
11 three major credit bureaus change, and they can change
12 sometimes on a daily, weekly, and monthly basis. So part of
13 the service that we provide is the client doesn't have to.
14 We monitor those credit reports to see --

15 THE COURT: Do you actually ask for a credit
16 report as part of that service?

17 MS. KRAMER: Yes, Your Honor. We saw a moment ago
18 in the contract that the client is giving Lexington Law
19 permission to request --

20 THE COURT: But what do you do? What do you do?
21 I'm a client, you say you're going to monitor me. That's
22 fine. What do you do?

23 MS. KRAMER: So we monitor, Your Honor, changes to
24 the client's credit report, or the credit reports coming out
25 of the three different agencies.

1 THE COURT: But the credit bureau doesn't respond
2 to you. He responds to the client.

3 MS. KRAMER: So if there is a particular trade
4 line, for example, where there's a challenge or an item
5 verification letter that is sent, Lexington Law will monitor
6 that trade line. There's one of potentially many trade
7 lines on a credit report. We will potentially periodically
8 check in with a client to see if there's been any
9 correspondence, or if there hasn't been a response that
10 we're aware of, based on the legal analysis and the
11 algorithm that has been created, there's a particular
12 cadence for follow-up letters that will be sent that we
13 found, based on our years of experience, to be the most
14 effective to get a response.

15 THE COURT: Your next item after you monitor
16 whatever you monitor.

17 MS. KRAMER: And the last one -- well, after the
18 monitoring provision, Your Honor, it says provides you with
19 status updates regarding your case.

20 THE COURT: Okay. Now do you do that? How do you
21 do that unless I ask?

22 MS. KRAMER: Primarily, Your Honor, through that
23 client's portal that we talked about earlier. Anytime
24 there's an additional communication that's sent out, anytime
25 there's a communication back from a credit bureau that we're

1 made aware of, or any time there's a change to that
2 particular client's credit report from one of the bureaus.

3 THE COURT: Do you ask for a new credit report
4 periodically?

5 MS. KRAMER: We do have updates to the credit
6 reports that come periodically from the bureaus, yes,
7 Your Honor. That's part of the monitoring and the updating
8 that we provide to our clients.

9 THE COURT: How often do they send you a new one?

10 MS. KRAMER: I would have to confer, Your Honor,
11 to get that exact time frame.

12 I understand also that part of that is built into
13 the software platform that we use with the credit bureaus
14 via that special contract and relationship we have with the
15 credit bureaus so that we can get some of that information
16 through that platform.

17 THE COURT: Does anybody ever look at it?

18 MS. KRAMER: When you say does anybody, you mean,
19 Your Honor, does Lexington Law --

20 THE COURT: With live eyes look at the credit
21 report.

22 MS. KRAMER: Yes, Your Honor. In fact, there are
23 Lexington Law paralegals that are often involved, for
24 example, at that stage of review and monitoring the cases,
25 and seeing what are the best next steps for a particular

1 client.

2 THE COURT: Are they employees of Heath or are
3 they employees of Progrexion?

4 MS. KRAMER: The paralegals are employees of
5 Heath, Your Honor, of Lexington Law.

6 THE COURT: Okay. How many do we have of those?

7 MS. KRAMER: Your Honor, I would have to
8 double-check the number at this moment. I believe the last
9 time we checked it was around 39.

10 600, Your Honor. I apologize. I was wildly off.

11 THE COURT: Where are they housed?

12 MS. KRAMER: In terms of where they work from?

13 THE COURT: Yeah.

14 MS. KRAMER: I know a number of them work here in
15 the State of Utah, Your Honor, and then there are others who
16 work remotely from other locations.

17 THE COURT: I know there are a lot in Phoenix,
18 supposedly.

19 MS. KRAMER: Yes.

20 I will say also, Your Honor, in the last two years
21 or so, in today's post-pandemic world, I know that remote
22 options are more accessible for more people nowadays.

23 If Your Honor would like, there's additional
24 services that are laid out in the contract.

25 THE COURT: Yeah. I'm interested in services. So

1 this is what you're promoting. This is what you're selling.

2 MS. KRAMER: Exactly, and what we're providing to
3 clients.

4 So that last line of that paragraph I was just
5 reading about what Lexington Law does subsequent to that
6 initial work, the last line says and prepares and sends one
7 or more additional communications on your behalf. So that's
8 to Your Honor's question about what happens in month two, or
9 month three, or month four, for example.

10 The next couple of paragraphs in these services
11 section, one of them is one that we highlighted earlier
12 about what we cannot guarantee and what the client is not
13 paying for.

14 So as we said, we cannot guarantee and you are not
15 paying for a particular credit report outcome or result.
16 You are paying only for Lexington's efforts on your behalf.

17 And, your Honor, I think that line really sums up
18 well all the services that are being offered. It's
19 Lexington's efforts -- their best and zealous efforts on
20 behalf of the client.

21 THE COURT: That's such an ambiguous term to begin
22 with, whatever the efforts are, and you try to narrow it
23 down with your contract. Okay.

24 MS. KRAMER: That is fair, Your Honor.

25 So if we go on to the contract, there's another

1 paragraph about Lexington's representation, its goals, and
2 such. But there's another section that begins at the bottom
3 of this page -- Mr. Schliesske -- it's section A, credit
4 repair service levels. And this is where, to Your Honor's
5 point, there's more detailed information for the client
6 about what efforts that client can expect to receive and
7 will receive.

8 THE COURT: What are the efforts?

9 MS. KRAMER: Sure. So just to start, there's a
10 Concord Standard service level. There's a Concord Premier
11 service level and a Premier Plus. And there are a few other
12 products.

13 But just to give you an example, Your Honor, that
14 I think really highlights this, let's take a look at the
15 Concord Premier and Concord Standard service level.

16 So here -- on that same page, Mr. Schliesske,
17 yes -- credit repair service levels, the Concord Standard.
18 The Concord Standard service level will assist you in
19 requesting that bureaus and furnishers demonstrate their
20 compliance with various laws governing fair, accurate, and
21 substantiated consumer credit reporting. Based upon its
22 analysis of your credit reports and the information and
23 instructions you provide, Lexington will prepare and send
24 communications to bureaus and up to three communications to
25 furnishers during a service interval on your behalf and in

1 your name to verify and/or challenge the accuracy of your
2 credit reports.

3 THE COURT: You don't ask for that on the standard
4 level, the early level?

5 MS. KRAMER: That is the Concord Standard level,
6 Your Honor. I'm reading directly from Concord Standard.

7 THE COURT: Does that include what we've been
8 talking about as to services?

9 MS. KRAMER: Yes. So all of --

10 THE COURT: Is this the \$79 level?

11 MS. KRAMER: It is the standard level. I'll have
12 to double-check if it's currently \$79, Your Honor, because I
13 want to be perfectly clear. But, yes, this is the standard
14 level. And the paragraphs we read earlier that were
15 broader, generalized descriptions of the services that
16 Lexington offers, that's offered to all consumers. So here
17 we're down more into the details, as Your Honor pointed out,
18 to really lay out for clients in black and white --

19 THE COURT: You said three requests, is it?

20 MS. KRAMER: So that's up to three requests --
21 three communications to furnishers. There's a difference
22 between the furnishers and the bureaus.

23 And if we go to the next page of the document,
24 Your Honor -- if you don't mind, Mr. Schliesske, the first
25 full paragraph that begins clients who engage -- clients who

1 engage the Concord Standard service level -- which we were
2 just talking about -- or Concord Premier service level --
3 because both -- for the following example numbers of
4 specific service intervals -- so example number of months --
5 have the following average number of communications sent to
6 bureaus and furnishers. In one service interval -- that
7 first month -- four to six communications. Two service
8 intervals, eight to 12 communications. Four service
9 intervals, 16 to 24 communications. And it continues.

10 So that lays out for the client in terms of the
11 service we provide what, in concrete terms, for the Concord
12 Standard service level am I getting and how much am I
13 getting every service interval for every month.

14 THE COURT: That's a standard form that's
15 generated in that segment of time by the communication.

16 MS. KRAMER: It's a communication that's sent out.
17 So it could be, for example, in that first service interval,
18 Your Honor, a client may have, in the Concord Standard
19 program, four to six different communications that go out.
20 Those could all be different, Your Honor. Some could be to
21 the credit bureaus, some could be to furnishers.

22 THE COURT: As instructed by the client?

23 MS. KRAMER: With input from the client,
24 Your Honor, but as instructed by the lawyers' directions to
25 the algorithm.

1 THE COURT: No, no. In the contract itself it
2 says pursuant to your instructions, doesn't it?

3 MS. KRAMER: It does, Your Honor, because the
4 client doesn't necessarily say I want you to challenge A, B,
5 C, D, and E.

6 I apologize. That was too fast. I will slow
7 down.

8 I don't necessarily want you to challenge, you
9 know, this or that specific trade line. Some clients do,
10 but other clients just may say I have been having an issue
11 with student loan debt or medical debts, and I'm not sure
12 what these particular things mean. What can you do,
13 Lexington Law, to help me? And we provide counseling --

14 THE COURT: You send a letter.

15 MS. KRAMER: So it says earlier in the contract,
16 Your Honor, in one of those paragraphs I mentioned briefly
17 about Lexington's representations, I didn't go through word
18 for word but it says, in part, regardless of the service
19 level, Lexington uses its judgment and discretion to
20 determine the content, number, and frequency of the
21 communications. The way that any lawyer would, of course,
22 you know, take their client's instructions and goals, but at
23 the same time you have to use your professional and ethical
24 judgment.

25 THE COURT: I think that's probably true. How do

1 they use it here if the pattern is used in contrast to a
2 conversation with a live person?

3 MS. KRAMER: Sure. So in terms of which
4 particular form letter, which particular pattern letter is
5 used -- as I mentioned, there are over 20,000 possibilities,
6 right, Your Honor? So the part of the goal of the algorithm
7 and of this machine, the system, is to basically do the
8 process that a lawyer would do through a live conversation
9 with a client by saying --

10 THE COURT: Who sends that?

11 MS. KRAMER: Well, by saying, Your Honor, like
12 here are these data points that we get from the client, the
13 same way I would ask questions of a client in my office, and
14 just as we analyze live, maybe in a conversation, all right,
15 based on these factors about your case, these particular
16 aspects, these goals, these laws and regulations, here's, I
17 think, the best next step.

18 That's similarly what the algorithm does,
19 programmed at the direction of lawyers, to go, based on this
20 consumer's or client's data, their profile, their credit
21 report, their financial and personal information, what,
22 based on all of the collective legal knowledge that's been
23 put into this system, is the best option for this client in
24 this scenario.

25 THE COURT: Why do you need a live lawyer at all?

1 MS. KRAMER: Well, Your Honor, there has to be in
2 order for us to operate as a law firm lawyers. But to your
3 point, Your Honor, this is how, in the Lexington Law
4 context, we've leveraged technology so consumers can benefit
5 from legal services in this way.

6 THE COURT: Machine services, if nothing else.

7 MS. KRAMER: Your Honor, absolutely correct.
8 There's a machine here that is utilized in the provision of
9 legal services.

10 It's the same way that often there are -- I know
11 in a number of law firms, in a number of legal offices
12 throughout the country, paralegals who perform many legal
13 services. And it's not necessary or even desirable for some
14 clients to have to talk to their attorney very often. They
15 may say I just want to deal with the paralegal.

16 At this point, Your Honor, if you have -- I have
17 confirmation on the current prices of the different levels
18 that are offered to clients, if that would be helpful.

19 So the Concord Standard policy, that program level
20 that we were just speaking of, is currently 95.95 per month,
21 or per service interval.

22 THE COURT: They've raised the price.

23 MS. KRAMER: There have been increases over the
24 years, Your Honor. I think, unfortunately, we're seeing
25 that in many products all across the country.

1 The Concord Premier service level, which is the
2 next step up, we didn't go into all the details, but was
3 referenced, that's \$119.95 per month, or service interval.

4 And then the third product is the premier plus
5 level, that's offered to clients at \$139.95 per month, or
6 service interval.

7 THE COURT: What's the service that's the plus?

8 MS. KRAMER: If we take a look at the contract,
9 Your Honor -- thank you, Mr. Schliesske -- on that same page
10 we were looking at, there's a description of Concord Premier
11 plus.

12 THE COURT: What's the plus?

13 MS. KRAMER: The Concord Premier plus service
14 level will, in addition to all services provided under the
15 Concord Premier service level, provide -- so the plus --
16 additional communications, periodic credit score tracking,
17 management tools for identity protection and personal
18 finance, and other communications as requested and as
19 applicable that leverage additional consumer protections.

20 There's then a paragraph that gives the same type
21 of examples that we saw for the standard plan of if you
22 engage for X number of service intervals, here is an average
23 range of communications that would be sent out.

24 THE COURT: Now other communications or
25 communications in and of itself, you construct the letter

1 with the client? Do the telemarketers construct the letter
2 with the client to which they affix the client's name?

3 MS. KRAMER: No, Your Honor. The Progrexion
4 telemarketing representatives do not themselves construct or
5 create the letter. That is done by the algorithm and by the
6 system at the direction of attorneys.

7 THE COURT: By the machine?

8 MS. KRAMER: That's correct, Your Honor.

9 THE COURT: Okay. And as the result of the input
10 of the information concerning the client, by the client?

11 MS. KRAMER: Yes, that is correct, Your Honor.
12 All of the information, at least at the initial phase, for
13 example, that the Progrexion Teleservices agent takes down
14 from the client, the intake, if you will, all of those data
15 points get fed into the algorithm, which then considers that
16 individual client's unique case, their unique data and
17 information. And then using the algorithm in the machine
18 that's been programmed by and working at the direction of
19 lawyers, uses that legal judgment to figure out what is the
20 appropriate of all of the options in terms of these letters
21 that could be sent out.

22 THE COURT: Okay. That's the machine deciding
23 which is appropriate?

24 MS. KRAMER: I would phrase it, Your Honor, as the
25 algorithm in the machine deciding based on the instructions

1 from attorneys. So at the end the day, in terms of what's
2 the judgment behind the decision, the judgment behind the
3 decision is coming from the lawyers. It's coming from
4 Lexington Law.

5 THE COURT: Well, the lawyers that they haven't
6 talked to anybody about.

7 MS. KRAMER: That is correct, Your Honor, in many
8 instances, but that's how Lexington Law is able to offer
9 these types of legal services to consumers at the price
10 points we just talked about.

11 If a consumer were to go and try to hire their own
12 individual lawyer at many law firms, as I'm sure Your Honor
13 is aware, they could be paying hundreds and hundreds of
14 dollars per hour for these types of services. But by
15 leveraging technology, Lexington Law is able to offer
16 consumers who have a real need for these services but can't
17 necessarily afford or don't necessarily want to pay those
18 high lawyer hourly bills, can still have access to these
19 types of legal services.

20 If Your Honor has additional questions --

21 THE COURT: Are these legal services?

22 MS. KRAMER: Your question is purely are these
23 legal services? Yes, Your Honor, these are legal services
24 being offered by lawyers and by paralegals, and others,
25 working at the direction of lawyers.

1 To give you another example of how legal services
2 nowadays may be using not necessarily the exact same
3 structure as Lexington Law but similar technology, there's a
4 company called Legal Zoom, Your Honor may have heard of.
5 There's a number of court cases about Legal Zoom, and Legal
6 Zoom is another type. It's another company that offers
7 legal services of different types to consumers, or the
8 clients, but it leverages technology in order to make legal
9 services more accessible because there is such a need and
10 there's such a demand, but there's not necessarily, you
11 know, your average American out there ready to jump up and
12 pay hundreds of dollars an hour.

13 THE COURT: Almost like going to the automat and
14 putting your quarter in.

15 MS. KRAMER: Perhaps in a different context,
16 Your Honor, yes. But the great thing in this case is that
17 the types of services offered by Lexington Law, there are
18 cases like, for example, the LegalZoom v. VNC Bar case that
19 talk about how, in fact, this is professional legal
20 services.

21 THE COURT: I'm genuinely interested in what
22 portion of the income that's billed by the law firm is
23 retained by the law firm and how much is paid out to the
24 advertiser, among others, and how much is retained --
25 actually retained by the law firm.

1 MS. KRAMER: So with the Court's indulgence,
2 Your Honor, if I may, just to confirm.

3 In terms of the breakdown of where the money goes,
4 the consumer's payments that come to Lexington Law, I'll
5 say, Your Honor, I don't have an exact breakdown right now
6 of where all of that money goes. We do have on our witness
7 list Mr. Chad Wallace, the CFO, who is prepared to discuss
8 in detail kind of the expenses breakdown and the net profits
9 breakdown, for example, of what's retained by the law firm.

10 THE COURT: You're in a position to talk with him
11 so that perhaps tomorrow we can have that information?

12 MS. KRAMER: We can track that down, Your Honor.

13 One thing I can tell you, though, that we did
14 track down today is the amount paid under the contracts
15 between Lexington Law and the various Progrexion entities,
16 in total, from the year 2021 and from 2022 to date. So it's
17 not a consumer by consumer breakdown, but it would give you
18 a sense of how much money Lexington Law has paid pursuant to
19 those contracts to Progrexion.

20 So for Progrexion Marketing, there's a contract
21 with Progrexion Marketing, Lexington Law paid in 2021
22 \$135,242,433.

23 Today, year to date for 2022 -- I should say May,
24 I'm sorry, May year to date, so not quite June, but the
25 first five months of this year, Lexington has paid to

1 Progrexion Marketing for those services \$39,763,011.

2 I also have the numbers for Progrexion
3 Teleservices, Progrexion IP, which is the licensing, and the
4 Progrexion ASG, which is the billing and back office. If
5 Your Honor prefers, I can provide those.

6 THE COURT: I'm interested.

7 MS. KRAMER: For Progrexion Teleservices for 2021,
8 the net contract value paid out was \$85,166,822. For 2022
9 through May, so the first five months, Lexington Law paid to
10 Progrexion Teleservices \$25,802,184.

11 For Progrexion IP, which is the Progrexion entity
12 that licenses the software products, Lexington Law paid, in
13 2021, \$128,076,546. And in 2022, through May, the first
14 five months, Lexington Law paid Progrexion IP \$49,087,558.

15 Finally, for Progrexion ASG, which provides the
16 billing, back office, et cetera, in 2021, Lexington Law paid
17 ASG \$41,051,665. And in 2022, through May, the first five
18 months of this year, Lexington Law has paid Progrexion ASG
19 \$18,627,450.

20 So those are the net contract payments or values
21 that have been paid by Lexington to the Progrexion entities.

22 THE COURT: Is there a figure as to what was
23 retained by Lexington?

24 MS. KRAMER: That I will have to confer with our
25 clients, Your Honor. We can try to track that down and get

1 back to you tomorrow.

2 THE COURT: That would be great. That would be
3 great.

4 Counsel suggests that you're covered by the reg.
5 Why aren't you?

6 MS. KRAMER: Why aren't the defendants covered by
7 the regulation in Count 1? As we discussed I know earlier
8 and in some briefing, Your Honor, specifically with respect
9 to Romanette (ii) of the regulation, it speaks, as we saw,
10 to sellers who have to then provide documentation of
11 promised results that have been achieved.

12 Now one thing that I know the government mentioned
13 earlier about the purpose behind this regulation and why the
14 FTC put it into practice in the first place, it's important
15 to remember that this particular regulation -- excuse me,
16 Your Honor. Thank you.

17 This particular regulation in the section is about
18 abusive telemarketing practices. Not all telemarketing
19 practices or all credit repair services, but it's about
20 targeting specifically abusive practices that were taking
21 advantage of consumers. One of those practices is that
22 there were companies out there marketing themselves as
23 credit repair, or under some other moniker, and making
24 promises to consumers about particular results that would be
25 seen on a credit report.

1 I gave some examples earlier, such as in 90 days
2 we guarantee we'll improve your score by 90 points. We
3 guarantee we'll remove all negative trade lines from your
4 credit report. And it's exactly those types of
5 representations that became an issue, because some of those
6 companies would send out floods of letters or challenges,
7 make consumers pay in advance, and then maybe something
8 would temporarily drop off of a credit report while a
9 creditor or bureau was investigating, but then they would
10 reappear. This is a process called reinsertion.

11 So the purpose really of this particular
12 regulation is to target those companies that are engaged in
13 abusive practices by making promises to consumers about a
14 particular lowered credit score in terms of points or
15 removing particular or all trade lines, maybe having that
16 happen temporarily, but then, after having absconded with
17 the consumer's money, one, two, three months later, those
18 items are back on the credit report and the credit score
19 drops. So that's what was -- that's the type of behavior
20 that was intended to be targeted by this regulation.

21 When we're talking about Lexington Law and the
22 Progrexion defendants and why it does not apply to us, if
23 you look at our credit repair services and the services that
24 we offer consumers, how they're laid out in our contracts,
25 how they're marketed, how we tell third-party affiliates to

1 describe them, it's very clear in multiple fora, we do not
2 make those types of promises or guarantees. We are not that
3 type of company who is going out there and promising a point
4 jump of X number on your credit score. Rather, we want to
5 be helpful and transparent with our clients about what we do
6 provide.

7 We provide credit repair services, as that term is
8 defined in other statutes, but we do not engage in abusive
9 practices by promising particular results that are visible
10 on a credit report but then forcing consumers to pay in
11 violation of this particular regulation.

12 So that is why, Your Honor, our position is, as
13 we've briefed extensively and argued before, at least in
14 particular Romanette (ii), does not apply to the defendants
15 in this case.

16 THE COURT: You do market credit repair?

17 MS. KRAMER: We do, Your Honor, and that's that
18 term. Credit repair is not a term that we necessarily --
19 it's used for some of our products. But just to be clear,
20 Your Honor, credit repair as it applies in the statutory
21 context and in the FTC statutes and regulations is a defined
22 term.

23 THE COURT: How is it defined in the regs?

24 MS. KRAMER: If Your Honor would give me just a
25 moment's indulgence.

1 We're going to pull up the relevant regulations,
2 Your Honor, so that I can make sure I'm completely accurate
3 in terms of the wording.

4 But in terms of the credit repair services, yes,
5 we do offer credit repair services. That is what we offer
6 and make very clear to our clients what that means. So we
7 don't want there to be any mistaken impressions on behalf of
8 our clients about what they're signing up for and what
9 services they're getting when they're signing up for credit
10 repair with Lexington Law.

11 THE COURT: What are you repairing?

12 MS. KRAMER: We are working with consumers to
13 repair, often, their credit reports, maybe their credit
14 scores, but sometimes it's just their credit profile and
15 understanding. Part of what we offer to consumers, as
16 Your Honor heard as we walked through the services provided,
17 is information and tools about how to build credit, about
18 the credit industry, and credit repair. Part of what we
19 offer is verification of what actually appears on a
20 consumer's credit report.

21 So those are the types of services where when we
22 talk about credit repair, it's not just about jumps in
23 numbers or negative items coming off. We do find
24 empirically that that does happen for the vast majority of
25 our clients, but that's not the only component to our credit

1 repair services. We do have those others as well.

2 So when we say credit repair and what that means,
3 that's why we have a contract that specifically lays out all
4 the different services that are encompassed.

5 THE COURT: We've talked about this before, but on
6 page 13 in the suggested form of order, additional facts,
7 Count 1, Progrexion markets Lexington Law and
8 CreditRepair.com as services that will assist consumers in
9 removing derogatory information from, or improving, the
10 consumer's credit history, credit record, or credit rating.

11 So you say you're going to help them try to
12 remove, and I understand that. But you do have a goal as
13 suggested here?

14 MS. KRAMER: That's correct, Your Honor. That is
15 one of the goals.

16 I'll say about this particular uncontroverted
17 fact, as it appears in the PTO, in creating the section of
18 the proposed pretrial order, or PTO, the parties took the
19 instructions in this model pretrial order from the District
20 of Utah.

21 THE COURT: That's too bad.

22 MS. KRAMER: Well, without hearing otherwise,
23 Your Honor, we wanted to follow the instructions, and, in
24 particular, the government wanted to ensure -- and I believe
25 I'm saying this correctly -- that the certain admissions

1 from the answer filed by defendants in this case -- or the
2 answers of both Heath and the Progrexion defendants were
3 reflected in this uncontroverted fact section. So this
4 particular paragraph 14 is verbatim, one admission that was
5 made in the answer to the complaint in this case.

6 THE COURT: Well, it's your stipulation.

7 MS. KRAMER: It is. You're exactly right,
8 Your Honor. We did not --

9 THE COURT: Set out there this is what we're
10 marketing.

11 MS. KRAMER: It is, Your Honor. We are -- I
12 should say Progrexion is marketing Lexington Law and
13 CreditRepair.com as services that will assist consumers.
14 That is true and that is part of what they're marketing.
15 That's not to say that there aren't other services also that
16 Lexington Law and CreditRepair.com offer that --

17 THE COURT: I'm talking about this.

18 MS. KRAMER: Of course, Your Honor. All I mean to
19 clarify is that to the extent we're trying to define all of
20 the services that Progrexion markets for Lexington Law and
21 CreditRepair.com, and everything that Progrexion says about
22 those services, that's not necessarily what's captured in
23 this paragraph because we were following what we believed
24 were the instructions for the pretrial order in terms of
25 specific phrasing from the answer.

1 THE COURT: Some people use that, but it deals
2 with surplus matters often, redundant matters that aren't
3 needed. There are all kinds of things that where it's far
4 more simple to identify what it is we're talking about, and
5 skip all of the redundant stuff because it just wastes time
6 for everybody.

7 MS. KRAMER: That's exactly right, Your Honor. So
8 there are certain uncontroverted facts proposed by either
9 one or both parties that may be candidates for that.

10 THE COURT: Well, the effort -- the effort in
11 assistance is to assist consumers to do what? Removing
12 derogatory information. Okay. We've got letters from for
13 improving the consumer's credit history. Well, history is
14 inaccurate so you modify it.

15 MS. KRAMER: Well, and at times, as has been
16 recognized by the government itself in many publications,
17 there are many inaccuracies in the credit reporting
18 industry. So part of what we offer is assisting consumers
19 to resolve those inaccuracies.

20 THE COURT: Well, you're correcting the history.
21 You're correcting the record. You're correcting the
22 ranking. Those are sort of a little beyond hope. They're
23 an indication of goals that are marketed to attract people
24 one way or another to use your services as defined in your
25 contract.

1 MS. KRAMER: That is correct, Your Honor. Those
2 are several of the goals and some of the primary goals that
3 our clients may have when they engage us. And part of what
4 we do and what Teleservices representatives do when they're
5 talking to potential clients is determining whether, in
6 fact, a particular consumer is a good candidate for our
7 services.

8 So there are some consumers who come in, who might
9 call to want to talk to Lexington Law, and they say I want
10 to sign up for credit repair services. But sometimes, after
11 looking at that consumer's profile or their credit reports,
12 we may realize this person isn't a good candidate for our
13 services. They don't have negative trade lines to be
14 removed or they may have items that they have already
15 verified and we will not challenge true, accurate, verified
16 items.

17 And so what happens on those calls is our agents
18 will say you know what, we don't think you're a good
19 candidate for credit repair services. We may offer a credit
20 monitoring service, but Lexington Law's goal is not to just
21 sign up as many consumers as possible regardless of their
22 needs. That wouldn't be ethical.

23 That's also what guides our practice with current
24 clients. There's a process where periodically Lexington Law
25 runs data and evaluates whether clients are getting a good

1 enough return on their payment in terms of negative items
2 that are left, or trade lines that we think can be removed.
3 And if Lexington determines that this client is still
4 willing to keep paying for our premier level service, that
5 they're not getting their bang for their buck, they no
6 longer need this level of service, we will affirmatively
7 reach out and tell that client we think that maybe this
8 level of service is no longer necessary. Maybe we can
9 transition you to a different monitoring product.

10 So part of the intention here, Your Honor, is yes,
11 these are the goals for a lot of our clients and consumers,
12 and they're some of the things that we and Progrexion market
13 for Lexington Law to assist consumers in trying to achieve.
14 Others as well, but this is certainly a part of it.

15 But then there is a process by which Lexington Law
16 and Progrexion ensure that we are signing up consumers for
17 the appropriate products as long as they're a good fit.

18 THE COURT: Okay. Why don't you describe for me
19 how you charge and how you get paid.

20 MS. KRAMER: Yes, Your Honor.

21 In terms of Lexington Law charging, for example, I
22 know it's laid out in the contract, but to kind of talk
23 practically, what happens is once a consumer signs their
24 contract, there's the first service interval that happens
25 five to 15 days after signing the contract, and that's the

1 first time that a consumer or client is charged.

2 The consumer, or client, when they sign up and
3 sign up with a contract with Lexington Law, provides most
4 often credit card information, and gives authorization for
5 Lexington Law to charge their credit card on a service
6 interval basis, which generally is a monthly basis, for the
7 work that was performed during that past service interval,
8 past month.

9 So after that initial service interval, which
10 involves all of the setup, thereafter, on a monthly basis,
11 that's one service interval is one month, after the work has
12 been performed, Lexington Law, through its contract with
13 Progrexion ASG, who actually performs this charging, will
14 then charge the client -- for example, right now it's
15 June 29th. So if a service interval for a client ran from
16 June 1st through June 30th, Lexington Law would perform all
17 that work. And then after the service interval has ended in
18 the month of July, they would then bill the client or charge
19 the client for the work performed in the month of June.
20 That's how we charged in compliance with FTC regulations,
21 including CROA.

22 Then in July when that charge is made pursuant to
23 the credit card authorization and the contract that the
24 client signed, Progrexion ASG will charge, and on behalf of
25 Lexington Law will charge that client's credit card for the

1 monthly fee, or service interval fee for the services
2 performed, in our example, in the month of June.

3 THE COURT: Are services actually performed?

4 MS. KRAMER: Yes, Your Honor. They are.

5 THE COURT: By a machine or by some live person?

6 MS. KRAMER: Depending on the service interval,
7 depending on the month and the client, it could be one, the
8 other, or both.

9 THE COURT: Depending on the level of service.

10 MS. KRAMER: Well, any Lexington Law client can
11 talk to an attorney or talk to a paralegal, but in terms of
12 the number of communications sent out or other services that
13 we talked about beyond communications, that does vary
14 depending on the service level.

15 THE COURT: If you don't perform any services, you
16 don't charge?

17 MS. KRAMER: I don't believe -- especially with
18 respect to some of the other products that are offered as
19 part of credit repair, Your Honor, and our services, I don't
20 believe there would be a month that goes by without us
21 providing some type of service to the client.

22 THE COURT: That's always interesting because if
23 the service performed would ordinarily be a very minor type
24 of activity, you charge the full price for the level that
25 you're at?

1 MS. KRAMER: We would, Your Honor, but that's
2 exactly why, after we have a client who's signed up,
3 Lexington Law does a regular evaluation of that client's
4 profile.

5 So, for example, if you signed up for the premier
6 service level, and there's an average of -- I'd have to pull
7 up the contract, Your Honor, but a certain number of
8 communications, letters that you would expect to go out per
9 month, per service interval, if that client reaches a point
10 with us where we don't have any more letters to send out,
11 we've verified all of the items, we've challenged what we
12 can challenge, we will not just continue to bill that client
13 for an indefinite period of time without saying one word
14 about it.

15 What happens is we do an evaluation and we'll try
16 to identify those clients who no longer need that level of
17 service, and then we will reach out and encourage that
18 client to downgrade.

19 The clients also, I will point out, Your Honor,
20 sign in our contract and make a representation that they
21 themselves will also monitor their credit report and
22 evaluate whether they still need this level of service.

23 THE COURT: They can terminate with 30 days'
24 notice, I understand that. But I'm curious as to a matter
25 of practice, if you don't do anything that's worth charging,

1 do you still draw down at the end of the month?

2 MS. KRAMER: So there are instances, Your Honor,
3 where there is no charge for a month for a client because we
4 don't have the opportunity to provide a service.

5 The primary example of this is when a customer
6 came in and provided us certain account information, but
7 there's additional account information that we need that's
8 missing to complete our services, we won't charge the client
9 as long as we're missing that information and we can't take
10 action. That would be unethical. So in those instances we
11 don't charge the client because we're unable to provide that
12 particular service.

13 THE COURT: I was curious as to whether you charge
14 while everybody is awaiting a response from the credit
15 bureau, who is slow and late in responding, and you go
16 through month one, no response, and you go through month
17 two, no response, do you charge for month two if the credit
18 bureau hasn't responded?

19 MS. KRAMER: Well, for a particular consumer, if
20 there's only one negative item and there's only one letter
21 that's going to be sent out on behalf of Lexington Law, in
22 those instances, Your Honor, under our contract, we actually
23 don't recommend those higher level service plans. We
24 recommend more of a monitoring and lower level plan where we
25 can do a one-off communication.

1 THE COURT: I was wondering what happens when the
2 letters are sent, people anticipate a response, and you
3 don't get one, and month two goes by waiting eagerly for a
4 response, and I'm just wondering if you charge.

5 MS. KRAMER: Well, during those subsequent months,
6 Your Honor, for many of our clients, they will have a number
7 of trade lines on their credit report that they'd like to
8 verify or challenge, and we don't send out all of the
9 letters all at once.

10 THE COURT: I understand you spread them out.

11 MS. KRAMER: Exactly, and that's in part to spread
12 out the other service intervals.

13 THE COURT: Just say that they're all like that,
14 but I'm interested, frankly, in knowing if you charge when
15 nobody has responded to the letters that you send.

16 MS. KRAMER: So if all of the communications that
17 can be sent out have been sent out --

18 THE COURT: Oh, yes.

19 MS. KRAMER: -- the consumer is still receiving
20 the benefit of additional services that we offer beyond just
21 communications.

22 THE COURT: Well, we've got available services,
23 but I don't take care of them. All I'm doing is waiting
24 eagerly for that response.

25 MS. KRAMER: Even if you, Your Honor, as a client,

1 for example, your primary goal and what you care the most
2 about is that response to that letter, there are still a
3 number of other services that you've contracted for that
4 Lexington Law is continuing to provide.

5 THE COURT: Such as?

6 MS. KRAMER: In terms of continued monitoring of
7 your credit report --

8 THE COURT: We monitor. You know, we monitor and
9 we haven't had a response. You haven't called me. I
10 haven't called you. I'm really interested in that question
11 because ordinarily if you send a nice letter, even by email,
12 to a credit bureau, they don't respond the next day. There
13 is often a time lag. If there is a time lag after
14 communications have been sent, client hasn't received
15 anything, you haven't received anything, do you charge?

16 MS. KRAMER: In terms of that client still being
17 active with the additional services that are part of
18 their --

19 THE COURT: The answer is you do charge, then, for
20 additional services.

21 MS. KRAMER: The services that are laid out in the
22 contract, they can be.

23 But, Your Honor, to your question about do we keep
24 charging if nothing is happening, if we have a client where
25 we have done all that we can do for them in terms of sending

1 out communications, again, while we contract and the client
2 represents that they will continually reevaluate whether
3 they need our services, we also take the affirmative step to
4 evaluate and affirmatively reach out to clients and say,
5 hey, you know what, it's been a certain number of months.
6 We've sent out all the communications we can. You might
7 still have some items on your credit report that you would
8 like to come off, but either they've been verified or we
9 don't think there's a high likelihood of that, we don't want
10 you, our client, to just keep paying for us to not
11 necessarily send out additional communications.

12 THE COURT: I appreciate that. I understand that,
13 and people are nice to do that. But my question still
14 remains. Other than the potential of monitoring, the
15 potential of analyzing, if you haven't had a response, do
16 you charge them the second month?

17 MS. KRAMER: We will, Your Honor. When there's --
18 I understand Your Honor has hit on monitoring, for example,
19 but there are other services that are still being provided
20 to that client.

21 Now our concern with -- I appreciate --

22 THE COURT: I'm not talking about potential
23 services --

24 MS. KRAMER: I agree, Your Honor.

25 THE COURT: -- or available services. I'm talking

1 about services rendered.

2 MS. KRAMER: Yes, Your Honor, we agree completely.
3 But the act of monitoring, what's happening on a consumer's
4 credit report, that's a service that not just Lexington Law
5 but many companies offer nowadays for consumers.

6 THE COURT: I don't care what others are offering.
7 I'm really interested in what you're doing.

8 MS. KRAMER: Very fair, Your Honor. So that is
9 one of the services that we offer.

10 We also offer continued analysis. We also
11 continue to offer to all of our clients access to that
12 internal portal and profile that we talked about that also
13 has additional resources for clients provided by and offered
14 by Lexington Law.

15 So in terms of what are the services that are
16 being offered and the services that are being performed by
17 Lexington Law, in practicality and pursuant to our contract,
18 it's not just sending out communications and waiting for the
19 response.

20 But as Your Honor -- I appreciate saying that it's
21 nice to do, to be proactive with our clients, but it's also
22 in the client's best interests. And as Lexington Law is a
23 law firm, we have ethical obligations in terms of being
24 zealous advocates for our clients and working in their best
25 interest. So part of this is fulfilling that legal

1 responsibility to inform our clients when we don't think
2 they're getting the proper value in terms of the value of
3 our services based on what they're paying.

4 If there's someone paying the 119 plus dollar a
5 month plan when in reality they don't need it, they could be
6 doing fine on the 99.95 plan, or even something less.

7 THE COURT: I think that's wonderful. I think
8 that's just great. But it doesn't answer my question, and
9 my question still exists, and I think it's a very pertinent
10 question, particularly, through experience, often the credit
11 bureaus don't respond.

12 MS. KRAMER: You're right, Your Honor. They
13 don't.

14 I will say two things on that point. Number one,
15 in terms of the communication with the credit bureaus, while
16 an average consumer may send a nice email, even a really
17 nice email to a credit bureau or creditor, that email
18 doesn't necessarily get looked at with as much priority or
19 as much expediency as, for example, some of the
20 communications that come from Lexington Law.

21 Part of the reason we have these special
22 relationships and contracts with the credit bureaus and we
23 have this electronic platform is because we have learned
24 that it is more efficient in terms of timing and in terms of
25 getting the attention of the credit bureaus to work with

1 them through this platform.

2 So part of when Your Honor is thinking, all right,
3 I sent an email off into the ether and I'm waiting for a
4 response, there's a different structure that's happening
5 with Lexington Law and the credit bureaus in terms of their
6 modes of communication.

7 THE COURT: I understand that, and I appreciate
8 that. But, you see, the credit helper who assisted me
9 didn't sign the communication. He signed my name to the
10 communication. And I've been waiting expectedly for a
11 response -- for a response that doesn't come, and one month
12 goes by, and two months go by. Do I see a withdrawal on my
13 credit card at the end of the second month while I'm waiting
14 to find out if the letters did any good?

15 MS. KRAMER: So one thing that is important to
16 note, Your Honor, in terms of what happens in response to a
17 letter sent to the credit bureau, you may, the client, be
18 waiting for a letter in response, but as --

19 THE COURT: It's sent by the client, though signed
20 by the firm.

21 MS. KRAMER: Correct, Your Honor. But sometimes
22 what happens in reality is the credit bureau never sends a
23 letter back to the client. What the credit bureau does is
24 they may remove that negative trade line anyways as a result
25 of the letter, because the credit bureau, as Your Honor

1 asked earlier, doesn't necessarily, in all circumstances,
2 have an affirmative obligation to send a letter to the
3 client. So part of what we're doing as Lexington Law --

4 THE COURT: I'm just saying the passage of time,
5 the end of the second month, do you draw down using the
6 credit card?

7 MS. KRAMER: I will say, Your Honor, we are not
8 aware of --

9 THE COURT: Check that out for me and maybe
10 tomorrow we can chat about it as well.

11 MS. KRAMER: I'm happy to continue to dig,
12 Your Honor, but I can tell you, from conferring with my
13 colleagues, we are not currently aware of any instance where
14 there are charges made to clients when there is zero
15 communications being sent out.

16 THE COURT: Even though I'm available, if you call
17 me and talk to me?

18 MS. KRAMER: That's what I'm aware of right now,
19 Your Honor. We can look into this tonight and confer.

20 But, again, the goal of Lexington Law is to try to
21 make sure that we're providing a service and only charging
22 clients when we provide that service. It would be unethical
23 and it's not something that we're trying to do or doing
24 pursuant to our contract to charge a client for a particular
25 service interval when we didn't do anything for that client.

1 That is not what we would do.

2 THE COURT: You say you don't charge them?

3 MS. KRAMER: We're not aware of a client being
4 charged with no services being provided or no communications
5 being sent out. I will confer with my client and we'll
6 continue to look into that tonight. But I understand
7 Your Honor's question and what you're trying to get at, and
8 we'll dig into that and confirm.

9 THE COURT: Thank you.

10 Anything else you want to tell me?

11 MS. KRAMER: At this point, Your Honor, not
12 specifically as to Count 1, which I understand was what the
13 government initially addressed.

14 THE COURT: Well, we'll let counsel respond.

15 MS. McOWEN: Thank you, Your Honor.

16 A lot has just been said and much of it the Bureau
17 disagrees with, in particular, the characterization of these
18 services as legal services, and some of what Ms. Kramer has
19 described as far as the detailed analysis and attention of
20 legal minds to the customers of Lexington Law firm, but I do
21 not have time to respond point by point to all of the
22 material, which I believe is mostly extraneous to the
23 question before the Court.

24 And I'd like to just bring us back to the
25 complaint, I'd like to bring us back to the stipulated

1 uncontroverted facts, and I'd like to show the Court how the
2 elements pled in Count 1 of the complaint are satisfied by
3 the uncontroverted facts stated in the pretrial order.

4 There are no further facts to decide and the matter can be
5 resolved, I think, rather cleanly on the law.

6 So I would point the Court to Count 1 of the
7 Bureau's complaint. It's not very long. It first states
8 the text of the regulation.

9 Ms. Kramer has emphasized and stated repeatedly
10 that defendants' position is that they are exempt from this
11 regulation because of Romanette (ii), and that they have not
12 violated Romanette (ii), which uses the word promised
13 results. But the regulation says that it is an abusive
14 telemarketing act or practice and a violation of the TSR for
15 any seller or telemarketer to request or receive payment of
16 any fee or consideration for goods or services represented
17 to remove derogatory information from, or improve, a
18 person's credit history, credit rating, or credit record
19 until, number one, the time frame in which the seller has
20 represented all of the goods or services will be provided to
21 that person has expired, and the seller has provided the
22 person with documentation in the form of a consumer report
23 from a consumer reporting agency demonstrating that the
24 promised results have been achieved.

25 So they have completely ignored Romanette (i),

1 which they are also in violation of and which is a separate
2 basis for this Court to rule on Count 1.

3 I would also like to focus -- so let me move to
4 the next paragraph of the complaint, paragraph 131. It says
5 the Progrexion defendants and Heath are sellers, and the
6 Progrexion defendants are telemarketers under the TSR. And,
7 Your Honor, I believe that is clearly established by
8 uncontroverted facts, particularly facts four as to Heath
9 and five as to CreditRepair.com.

10 The next paragraph of the complaint, paragraph
11 132, says the Progrexion defendants' and Heath PC's credit
12 repair services are represented to consumers as services to
13 remove derogatory information from, or improve, the
14 consumers' credit histories, credit reports, or credit
15 ratings.

16 Your Honor, that paragraph is established by the
17 paragraph you've been focused on, which is paragraph
18 uncontroverted fact 14 in the pretrial order.

19 THE COURT: I would appreciate it if you would
20 move the mike a little bit so that we can articulate.

21 That's great.

22 MS. McOWEN: Thank you.

23 The only remaining paragraph of this count
24 concerns when the defendants requested and received payment,
25 and that isn't controverted either. And for that you need

1 only rely on the contract that we've just reviewed in detail
2 or Ms. Kramer's presentation today about the fees. They're
3 not in dispute. The basic structure of the billing and fees
4 charged by these companies is not up for debate.

5 So with those few paragraphs of this pretrial
6 order, which line up precisely with these few paragraphs of
7 our complaint, we believe Count 1 is satisfied.

8 I'm happy to go into more detail about why the
9 government disagrees so strongly with their assertion about
10 legal services, but I don't want to spend an undue amount of
11 time on it. I will simply say that I believe it is a bit of
12 a red herring.

13 You asked, Your Honor, why have a lawyer at all,
14 and Ms. Kramer responded in order for us to operate as a law
15 firm. And that's precisely it. Progrexion is a marketing
16 company. What they specialize in is marketing, and they
17 have chosen to market two credit repair brands differently.
18 It's essentially the same service. It's described the same
19 way in the consumer contracts. But it is marketed for
20 CreditRepair.com as simply credit repair services, and it is
21 marketed as legal services when it's called Lexington Law.
22 And that's very attractive to some members of the consuming
23 public.

24 But the services, Your Honor, are the same. The
25 letters they send out are the same. And I mean the same.

1 We have, for example, a potential witness on our
2 trial witness list, Mr. McQuiller, who is a customer of both
3 brands, which is not that unusual, at different times, and
4 he has in his records the same form letter sent once on
5 behalf of -- once while he was a customer of Lexington Law
6 and once when he was a customer of CreditRepair.com.

7 The sales scripts are essentially the same. The
8 training for sales agents is essentially the same. The
9 bones of the service and the provision of the service, even
10 the pricing and billing structure is all essentially the
11 same.

12 I also want to respond to the comment Ms. Kramer
13 made about how in their view Lexington Law makes legal
14 services available to people who wouldn't otherwise be able
15 to afford that. And, again, I'll be brief, but just to hit
16 on one point, I want to point out that she says that
17 attorney time can cost hundreds of dollars an hour. But
18 consider a customer of Lexington Law who has signed up for,
19 let's say, six months, and that person pays the company 600
20 or \$700, and they get zero minutes of attorney time. So
21 this assertion that this is a way to provide legal services
22 in an affordable way to people is, I think, just not
23 substantiated on the record.

24 I would only add, Your Honor, that you can see
25 this sort of tortured gymnastics that counsel has to go

1 through in order to try to describe the services as anything
2 other than services to remove negative items from a
3 consumer's credit report or improve that credit report. And
4 as we have said before, what they are marketing to consumers
5 is that improvement, is at least the hope of negative items
6 being removed and their credit score going up. And that is
7 the reasonable expectation that customers have when they
8 agree to pay this company \$100 a month. That is, in fact,
9 the definition of a promise, is that reasonable expectation
10 of obtaining that result.

11 It isn't a specific guarantee, but the law, prior
12 to the enactment of this regulation, was already full of
13 prohibitions against deceptive guarantees. The FTC didn't
14 need to add one more. There's already a prohibition against
15 deceptive acts and practices.

16 There is elsewhere in the telemarketing sales
17 rules a prohibition against deceptive representations about
18 exactly that, about the results. But what Section
19 310.4(a)(2) adds is different. It is not just a simple
20 prohibition against making deceptive specific guarantees.

21 What it does is it tries to, again, put guardrails
22 up against the inherent of the likely abusive and unfairness
23 of an industry that can peddle hope and then represent on
24 paper that they've provided some service. Some service,
25 they say, has been provided each month, and they'll make

1 sure that they have something they can point to, some bit of
2 consumer education, or some bit of monitoring, or something
3 that they sent to some credit reporting company. They'll
4 make sure they have something each month.

5 But the reason the Federal Trade Commission
6 enacted this rule was to say that's not what people are
7 paying for. What's being marketed and what people are
8 reasonably expecting from these engagements are results, and
9 those results are, unfortunately, often not forthcoming. If
10 they are forthcoming, then the company can document that
11 it's been achieved and the company can charge the consumer.

12 But I just want to emphasize that this is a very
13 different kind of regulation and it is designed to address
14 exactly what you've just heard about from Ms. Kramer for the
15 last hour and a half.

16 I'm happy to answer any of your questions you have
17 about Count 1, Your Honor. I'd also be happy to move to
18 Count 2.

19 THE COURT: Thank you.

20 MS. McOWEN: Thank you.

21 THE COURT: You're welcome to take a minute to
22 respond.

23 MS. KRAMER: Your Honor, I'm happy to respond now.
24 I also know we've been going for quite a bit of time. So if
25 either Your Honor or the court reporter needs a break, I

1 would also be happy to come back after a brief break.

2 THE COURT: I'm going to break for the day in a
3 few minutes. So respond now and we'll break for the day and
4 be good to you this afternoon --

5 MS. KRAMER: Understandable.

6 THE COURT: -- and start in tomorrow at ten.

7 MS. KRAMER: So to address two points that the
8 government just brought up, first with respect to Romanette
9 (i) of the regulation, which we didn't discuss beforehand,
10 the government asserts that the defendants have also
11 violated Romanette (i) in terms of our payment structure.
12 We disagree, and we've briefed this, as Your Honor may be
13 aware, extensively.

14 I want to point out that our billing practices, we
15 do not bill until all services for a particular service
16 interval have been provided.

17 And, in fact, Your Honor, there was a lawsuit that
18 was litigated in California, decided back in 2010, involving
19 Heath PC, as the defendant, specifically about our billing
20 practices, and it was in the context of another FTC
21 regulation, CROA. But similarly, it was about charging
22 advanced fees for services. And in that case the court
23 found that our service interval billing process was lawful
24 and was in compliance with those FTC regulations.

25 I have that citation available if it would be

1 convenient, but I know that's also been cited in the
2 briefing by the parties. But I didn't want to leave that
3 unaddressed, Your Honor, since Romanette (i) didn't come up
4 much in our discussion earlier.

5 Another just very brief point. I know that the
6 government mentioned about -- was talking about promised
7 results and what that means. We heard the term reasonable
8 expectation, or hope. But promised results, as that term
9 appears in the regulation, and in context, in reading the
10 regulation, we can understand and define the term results.
11 It doesn't mean reasonable expectation, and it doesn't mean
12 hope or goal of a consumer. It's very specific to a result
13 that a seller has promised to a particular consumer, and
14 it's a result that can be verified on a written credit
15 report.

16 Finally, Your Honor, I do have some of that data
17 that Your Honor was interested in knowing before about the
18 percentages of the consumer fees paid to Lexington Law,
19 about how much it retains and where those other fees go.
20 Right now what I can tell you, Your Honor, is in terms of
21 those payments I described earlier from Lexington Law to the
22 Progrexion entities, those millions of dollars payments we
23 discussed for 2021 and 2022 through May, I have the
24 percentage of Lexington Law's total revenue and what those
25 payments amount to, in total, in terms of that revenue.

1 So in 2021, in terms of those numbers we discussed
2 earlier and the contract payments made from Lexington Law to
3 the Progrexion entities, those payments were 82.7 percent of
4 Lexington Law's total revenue. And in terms of the payments
5 made in 2022 through the month of May, so the first five
6 months, the payments we discussed earlier amounted to 84.5
7 percent of Lexington Law's total revenue, in terms of paying
8 for all of the licensing fees, the services, the account
9 billing, the back office, the marketing and the teleservices
10 agents. So I wanted to provide Your Honor that information
11 as soon as it was available.

12 THE COURT: Roughly 15 percent was retained by
13 Lexington then?

14 MS. KRAMER: In terms of -- yes, Your Honor. I
15 don't have right now information about whether Lexington
16 Law's other expenses, for example, expenses related to its
17 own employees, how that would factor in. But at least in
18 terms of these particular contracts, as you can see, it
19 makes up a very large proportion of the revenue and the
20 amount that comes in from consumers.

21 THE COURT: I appreciate that.

22 MS. KRAMER: Thank you, Your Honor.

23 THE COURT: As I indicated, I'm going to give you
24 a break this afternoon. We'll reassemble tomorrow at ten,
25 and we'll continue with our conversation.

1 It may be that those who have exhibits that people
2 are going to worry about, you're welcome to use the
3 courtroom until five o'clock, or thereabouts, if you desire
4 to. Let's put it that way.

5 MS. KRAMER: Thank you, Your Honor.

6 THE COURT: I take it that you've abandoned any
7 claim of constitutionality?

8 MR. BENNETT: No, Your Honor. We're standing on
9 our objections and our defense -- the defenses related to
10 the Constitution, both under Article I and Article II, as
11 well as --

12 THE COURT: Well, you've talked about -- and
13 you've given me a citation, but the citation from the
14 Supreme Court talks about separating the single director
15 provision from the rest of the enactment and the rest of the
16 powers. I was curious as to why that was even given to me.

17 MR. BENNETT: So there's a couple of issues,
18 Your Honor, with respect to constitutionality. I think
19 you're focusing on the Seila Law issue, which is that the
20 director -- when the CFPB was initially constituted, it was
21 unconstitutional because of the appointment.

22 THE COURT: I'm going to let you talk about that
23 tomorrow when we get to it. Give you an opportunity to do
24 that. But as I read the case that you've cited, there was a
25 differentiation between the powers of the director and the

1 limitation on the president to fire him, but they separated
2 that --

3 MR. BENNETT: Yes, they did.

4 THE COURT: -- from the organization as an
5 organization, and the powers of the organization. And I'll
6 be interested tomorrow to listen to you on that subject
7 because I didn't think it helped you, but maybe I'm wrong.
8 I've been wrong before.

9 MR. BENNETT: To give you a sneak preview, the
10 word intersects is the statute of limitations and other
11 delay defenses, because the director who ratified this suit
12 initially was a nullity, not appointed correctly. By the
13 time a new director came around --

14 THE COURT: I don't think we're communicating. So
15 take a look at it. We can chat about it tomorrow.

16 MR. BENNETT: Thank you, Your Honor.

17 THE COURT: We'll be in recess today and give the
18 court reporter a big break because she's going to be busy
19 tomorrow.

20 MS. McOWEN: Thank you, Your Honor.

21 MS. KRAMER: Thank you, Your Honor.

22 THE COURT: Thanks a lot.

23 And you're excused. Don't worry about me.

24 (Whereupon, the proceeding was continued to
25 Thursday, June 30, 2022 at 10:00 a.m.)

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C E R T I F I C A T E

I hereby certify that the foregoing matter is
transcribed from the stenographic notes taken by me and is a
true and accurate transcription of the same.

PATTI WALKER, CSR-RPR-CP DATED: 7-11-2022
Official Court Reporter
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